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ILLINOIS STATE UNIVERSITY

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REPORTS

OF

CASES AT LAW AND IN EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ILLINOIS.

RE-REPORTED AND ANNOTATED

BY MARSHALL D. EWELL,

Author of "Ewell on Fixtures," etc.

VOLUME XXXIV.

CONTAINING A PORTION OF THE CASES DECIDED AT THE APRIL TERM, 1864.

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JUSTICES OF THE SUPREME COURT OF ILLINOIS,

DURING THE PERIOD COVERED BY THESE REPORTS.

CHIEF JUSTICE:

PINKNEY H. WALKER.

ASSOCIATE JUSTICES:

SIDNEY BREESE.

CORYDON BECKWITH.

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RULE OF PRACTICE

IN THE

SUPREME COURT OF THE STATE OF ILLINOIS

ADOPTED APRIL TERM, 1866, AT OTTAWA.

RECORDS ON WRITS OF ERROR, WHEN TO BE FILED.

RULE 75. *Ordered*, That hereafter no case which may be brought to this court upon writ of error shall be placed on the court docket for hearing, unless the record shall be filed on or before the second day of the term, or within such further time as may be allowed by the court for filing the same, except in extraordinary cases, the court, upon special application, may order a cause to be placed upon the hearing docket.

[1] At the January Term, 1872, at Springfield, fifty-four rules were adopted as a revised code of rules of the supreme court, and all rules adopted prior to that revision (March 25, 1872) were rescinded. See the revised rules in 55 Ill., XVII.

CASES

DECIDED BY THE

SUPREME COURT

OF

ILLINOIS.

THIRD GRAND DIVISION.

APRIL TERM, 1864.

ANDREW M. HITT et al., executors of SAMUEL W. HITT, deceased, vs. HENRY SHARER. [9]

ACTION FOR MONEY PAID: *What constitutes a payment, and when the action accrues.*

Where a note of $200 was given by one person for the debt of another, and all but $7 of it was paid by the maker in money, and the note was then surrendered to the maker, the remaining $7 being transferred to his account with the payee: *Held*, that this was a payment and satisfaction of the note, and that an action for money paid for the use of the person for whose debt the note was given accrued for the amount of the note at that time.

STATUTE OF LIMITATIONS: *When a bar to action for money paid.*

An action for money paid for the use of another, where the money was paid more than five years before suit brought therefor, and the promise to repay the same is not in writing, is barred by the statute of limitations (Scates' Comp., 752; Sess. Laws, 1849, 37).

SAME: *Same; mutual running accounts.*[1]

Where a note of $200 was given by one person for the debt of another, and all but $7 of it was paid by the maker in money and the note

[1] See Ayers *v.* Richards, 12 Ill., 147; Reeves *v.* Herr, 59 id., 81.

taken up more than five years before action brought by the maker for money paid, etc., the remaining $7 being transferred to the maker's account with the payee: *Held*, that the fact that the $7 was paid afterwards, and within the five years, did not remove the bar as to the advance made more than that period before bringing suit. In the case of mutual running accounts between parties, such is the law; but not so with mere isolated transactions, where the law implies a liability for immediate payment.

PRACTICE IN SUPREME COURT: *Exceptions.*

Where no exception is taken to the overruling of a motion for a new trial, the evidence will not be examined by the appellate court to see whether it supports the finding of the jury.[1]

APPEAL from Circuit Court of *Ogle* County.

This was a claim for money paid by appellee to one Allen for the use of appellants' intestate to take up a note given by appellee for a debt of said intestate, filed originally in the probate court for said county, and coming by successive appeals to this court. The evidence is sufficiently stated in the opinion.

The following instruction was given for the appellee.

"If the jury believe from the evidence that Sharer signed said note in fact as security to Allen for the benefit of Hitt, and that Hitt was to pay the same, Sharer is entitled to recover the amount of Hitt or his estate, if the jury believe that said Sharer paid said note, or any part thereof, within five years next preceding the filing of said claim in the probate court, February 5, 1861."

Judgment below for the plaintiff for $260.

H. A. Mix and *Leland & Blanchard* for appellant. *Glover, Cook & Campbell*, for appellee.

[12*] *WALKER, C. J. The instruction given for appellee, and to the giving of which appellants excepted, asserts that if any portion of the money was paid by appellee, within five years next preceding the filing of the claim in the probate court, then appellee had a right to recover. The limitation laws of the state require all suits on promises, not in writing,

[1] See McClurkin *v.* Ewing, 42 Ill., 283; Seibel *v.* Vaughan, 69 id., 257.

either express or implied, to be brought within five years, next after the cause of action has accrued, and not thereafter (Scates' Comp., 752). The cause of action in this case is of the character of claims embraced in that provision. It was for money paid for the use of appellants' intestate, and if it was paid more than five years before filing the claim in the probate court, the action is barred. The evidence tends to show that the money was paid, and the note was taken up, more than five years before the claim was filed. It is true, that there may have been a small portion which was not paid in money, but was transferred to appellee's account with Allen, and the note was surrendered. It would seem that all of the money due on the note[1] but seven dollars was paid in the fall of 1855, or earlier, if the evidence is to be credited, and the claim was not filed until February, 1861. The evidence shows that the note was given up when the payment was made, and, if so, the debt was satisfied, and an action could then, if ever, have been maintained for the recovery. That was a payment of the note, and if it was given for Hitt's debt, that debt was then paid to the holder of the note, and if an action ever accrued against Hitt it was at that time.

This instruction is based upon the supposition, that although *all of the note but seven dollars had been paid [13*] more than five years before the claim was filed for probate, and the seven dollars was paid afterwards and within the five years, that it removed the bar, as to the advance made more than that period before the filing of the claim. In case of mutual running accounts between parties, such is the law, but not so with mere isolated transactions, where the law implies a liability for immediate payment. Such transactions never imply a credit given, but the law gives an action for immediate recovery. When all of the note but the seven dollars was paid, appellee's remedy was then as complete as it ever became. He had then paid off and discharged the whole note, all in money but seven dollars, and that was passed to the holder's account against appellee, and the action then ac-

[1] The note was for $200.

crued, if at all, for the amount of the note. But if it were otherwise, the nonpayment of the remaining seven dollars did not prevent a recovery of what had been advanced. And if more than five years had intervened before the claim was filed, we would have no hesitation in saying, that it was barred by the statute of limitations.

It does not appear that any exception was taken to overruling the motion for a new trial, and we cannot, therefore, examine the evidence to see whether it supports the finding of the jury. *Boyle v. Levings*, 28 Ill., 314. The judgment of the court below is reversed and cause remanded.

Judgment reversed.

PHILIP J. PRICE, impleaded, etc., vs. PITTSBURG, FORT WAYNE AND CHICAGO RAILROAD CO.

DEEDS: *Delivery in escrow.*

It is generally true, that, if a deed is delivered to a stranger to be delivered to the grantee on the performance by him of certain conditions, and they are fully performed, and the deed delivered, the deed takes effect from the second delivery, and is to be considered the deed of the party from that time.[1]

SAME: *Same: A question of intention.*[2]

But in all such cases the *bona fide*, lawful intention of the parties is to be considered, and if it appears that the parties intended the deed should take effect from the day of its execution, if the condition was performed, and it is fully performed, it will so take effect. (The question of intention in this case was left to the jury.)

SAME: *Delivery to agent of the grantee.*

In order to constitute a delivery in *escrow*, the deeds must be delivered to a stranger. Where, therefore, they were delivered to the solicitor of the grantee, a railroad corporation, since a corporation can only act through its officers and agents, such delivery was considered a delivery to the corporation itself, taking effect immediately.

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[1] See Furness *v.* Williams, 11 Ill., 229; Stone *v.* Duvall, 77 id., 475; Skinner *v.* Baker, 79 id., 496.

[2] See Ill. Cent. R. R. Co. *v.* McCullough, 59 Ill., 166; Stanley *v.* Valentine, 79 id., 544.

Price vs. Pittsburg, Fort Wayne and Chicago R. R. Co.

LANDLORD AND TENANT; USE AND OCCUPATION: *Tenant presumed to hold over subject to the terms of his lease.*[1]

Where a tenant occupying land under a parol lease holds over, without any new agreement as to rent, after the expiration of his term, and after the sale of the land by his landlord, such holding over will be construed to be a holding over under the terms of the lease, and the same rate of rent may be recovered from the tenant by the vendee of the landlord in an action of assumpsit for use and occupation.

SAME: *What amounts to an eviction.*

Physical and forcible expulsion is not necessary to constitute an eviction; but any act on the part of the landlord, done in violation of the rights of the tenant, and without his consent, and which deprives him of the beneficial enjoyment of the premises, amounts to an eviction.[2]

SAME: *Same.*

Where land was devised to a tenant with the understanding that it might during the term be sold to a railroad company, and that in that event a railroad track might be laid across it; and the tenant held under that understanding: *Held*, that putting down the track after the purchase by the railroad company did not amount to an eviction so as to release the tenant from payment of rent.

APPEAL from Superior Court of *Chicago*.

The nature of the action and the evidence are sufficiently stated by the court.

The following instructions were given for the plaintiff, to the giving of which defendant excepted.

(1) As to the lot purchased by plaintiff from Lemuel Crawford, if the jury believe, etc., that defendant had, before the purchase by the plaintiff from said Crawford, occupied the same under a parol lease at a rate agreed upon between Crawford and defendant, and with the express understanding that if said lot should be sold to plaintiff at any time during the term of lease, no deduction should be made for the occupation by said company of the right of way across said lot for the remainder of the term, and that defendant held over after the expiration of said term without any new agreement than the law implies, and the jury will so find that the same rate of

[1] See Ewell on Fixtures, 143, 177 and cases cited; Griffin *v.* Kinsely, 75 Ill., 417; Higgins *v.* Halligan, 46 id., 173.

[2] See Bentley *v.* Sill, 35 Ill., 414; Halligan *v.* Wade, 21 id., 479; Wright *v.* Lattin, 38 id., 293; Hayner *v* Smith, 63 id., 430.

rent shall be paid for said lot by defendants after as before said purchase; and the jury will not take into consideration the alleged condition and want of repair of the dock of said lot, without proof of an express covenant to put or keep the same in repair by plaintiff or its grantor.

(2) As to the lot purchased by plaintiff of Singer & Talcott; if the jury believe, etc., that defendant occupied said lot after the purchase of the same by plaintiff, then plaintiff is entitled to recover for such use and occupation in this action, what the evidence shows the same to have been worth, if that was the agreement with Talcott, and they were holding under such agreement; and if the evidence shows that during the time the said premises were so occupied by defendant, the plaintiff had occasion to use and did use a part of said lot for tracks for its road, then the jury will allow to the plaintiff the full value of the whole lot up to the time of such occupation of part, and for the remainder of the time during which the lot was occupied by defendants, they will allow whatever the same was worth after such occupation of part. This is so, if it was the understanding that, in case the railroad should conclude the trade and give the bonds, that then they might take the possession of such parts of the lots as they might need, allowing to the tenants the right to occupy the balance of the lot, paying therefor a reasonable rent.

The following instructions requested by defendant and numbered 1, 2, 3, 4 and 5, were disposed of as follows: Instructions 1, 2 and 3 were refused, and 4 and 5 were refused as requested, but given with the qualifications indicated by brackets, thus, [ ], to which refusal and qualifications the defendant excepted.

(1) If the deeds conveying the lots in question, were delivered to Winston upon condition that they should not take effect until the bonds for the purchase money were delivered, then plaintiff cannot recover any compensation for the use and occupation of either of said lots, before the bonds given for such lots respectively were delivered. In other words, the plaintiff can only recover for the time that it had the title,

and its title only dates from the time when the conditions upon which the deeds were delivered were performed.

(2) If the jury believe, etc., that no price nor time of payment was agreed on, between the owners of the lots and defendant, for the rent for the year in question, but that the understanding was that it was to be a reasonable rent; and if they further believe, etc., that the deeds for the respective lots in question were deposited with Winston on condition not to become operative to convey the title, nor to be delivered to the company or be put on record, nor any use made thereof, unless and until the bonds to be given by the company were made and delivered to the respective owners of the lots, but were held as an escrow by Winston until that event, then plaintiffs cannot recover for any rent which had accrued previous to that time, although the deeds were when the bonds were delivered, to take effect as of the 1st May, 1860.

(3) If the jury believe, etc., that defendants were in the the fall of 1859, at the time of the conversation spoken of by Cobb, tenants from year to year, and were then holding over with the assent of Crawford for the year from May 1, 1859, to May 1, 1860 (and entitled to the possession of said lot for that time), at the rate of $1,200 a year, and Cobb and Price did make an agreement for that year at $1,200, and Price agreed the railroad might go through without charge or deduction, such agreement would not bind Price to let the road go through without charge or deduction, and would not control the right of the defendants in that respect for the year from May 1, 1860, to May 1, 1861.

(4) If the landlord, before the expiration of the lease or tenancy, against the consent of the tenant, evicts or expels the tenant from all or any substantial part of the premises leased, the tenant is discharged from the payment of any rent from the time of such eviction, and is not bound to payment for what he continues to occupy after such eviction. If there is no agreement to the contrary, the tenant is entitled to the possession of the premises without interruption or molestation by the landlord; and, if the jury believe, etc., that defendant was

tenant from year to year, and entitled to the possession of the premises in question from May 1, 1860, to May 1, 1861, and that against defendant's consent, and in the absence of any [understanding or] agreement permitting it, the railroad company [wrongfully] took possession of part of said lots for their railroad track, and continued to hold and use the same until May 1, 1861 [and evicted defendant therefrom], then such an eviction by the railroad company works an extinguishment of all rent for said premises from the time of its occurrence, notwithstanding defendant continued to occupy the residue of said lots until May 1, 1861. [But if it was the understanding that the railroad might put its track across the lots in the event of its electing to do so on completing its purchase, and defendant held under that understanding, then putting down the track after such purchase would not amount to an eviction.]

(5) Physical and forcible expulsion is not necessary to constitute an eviction; but any act on the part of the landlord which deprives the tenant of the beneficial enjoyment of the premises amounts to an eviction. [This is so, if the act was done in violation of the rights of the tenant.]

The following instructions were given for defendant, as requested:

(1) If the jury believe, etc., that defendant occupied the lots in question from May 1, 1860, to May 1, 1861, under an understanding or agreement with the owners thereof, that they should pay only a fair and reasonable rent therefor, the jury, in determining what was a fair and reasonable rent, should take into consideration the condition of the docks, and the occupancy by the railroad for their track and switches.

(6) If the jury believe, etc., that Mr. Foss (on May 1, 1860) told defendants that they might occupy the property in question, for a fair or reasonable rent, for the year from May 1, 1860, to May 1, 1861, and that he was authorized by plaintiff to do so, and defendants assented thereto, then defendants are not liable to pay the sum of $1,200 a year for the Crawford lot, if its rent was not reasonably worth that for said year, al-

though they may believe, etc., that Price did, in the fall of 1859, agree with Cobb to pay $1,200 a year.

(7) If the jury believe, etc., that the defendants occupied the lots in question from May 1, 1859, to May 1, 1860, under a lease for that year from the then owners of the lots, and that defendants continued to hold over and occupy the premises after May 1, 1860, with the assent of such owners, without any agreement before that time as to how they should occupy the lots, the defendants would be entitled to hold the premises for another year from May 1, 1860; and in the absence of any understanding or agreement permitting it, the plaintiff could not lawfully expel or dispossess them until May 1, 1861.

(8) If the jury believe, etc., that no price or time of payment for rent was agreed upon, but it was understood or agreed that the rent was to be for the year in question, only a reasonable rent, and that defendants occupied the premises in question on May 1, 1860, and thereafter till May 1, 1861, for a coal yard and for the coal business, and rented the lots for that purpose, and the owners of the lots knew, when they rented the premises, that they were to be used in that business, then the jury, in determining what the rent should be, should consider what the rent of the premises was worth in that particular business, and may take into account such inconvenience or interruption, if any, to that kind of business as occurred in consequence of the condition of the docks and the use of the portion of the lots by the railroad company for a track.

The assignments of error were:

(1) In giving said instructions for plaintiff.

(2) In the refusal and qualification of said instructions requested by defendant.

(3) In denying defendant's motion for a new trial, and rendering judgment against him.

(4) In the admission of certain evidence for plaintiff, and in the rejection of evidence offered by defendant as to damage sustained by him in his business by reason of plaintiff's track

over the premises, by plaintiff's allowing cars to stand thereon, making up trains thereon, etc.

(5) That the damages assessed were excessive, and the verdict contrary to law and the evidence.

(6) That said verdict was uncertain, insufficient, etc.

Geo. F. Bailey, for appellant. *Winston & Blodgett*, for appellee.

[32*] *Breese, J. This is an action brought to the superior court of the city of Chicago by the appellees against the appellants, on the common counts for the
[33*] use and occupation of *certain lots in that city. The defendants pleaded the general issue and *nul tiel* corporation. There was a trial by jury, and verdict finding the issues for the plaintiff, and assessing damages against Philip J. Price, impleaded with David Price, who was not served with process. A motion for a new trial was made and overruled, and exceptions taken. Judgment was entered on the verdict, and the record brought here by appeal.

There was much testimony heard as to the value of the use of these lots for a coal yard, and averaging the testimony of the witnesses on both sides, the jury would have been warranted in finding more than they did find. They certainly found less than they might have found from the testimony.

The principal point, however, which is made in the case is, as to the right of the plaintiffs below to recover at all for use and occupation. Of this we think there can be no doubt. By express agreement, when the plaintiffs purchased the lots of the former owner, under whom the defendant held as tenant by the year, it was agreed and understood, if the plaintiffs consummated the trade by delivering the bonds and mortgages by the fall of 1860, the deeds they had executed on and prior to the first day of May, 1860, and placed in the hands of the attorney and solicitor of the plaintiffs, were to take effect and be in force on the first day of May, 1860. The defendant insists that the delivery of these deeds to the solicitor of the company was, in effect, the same as a delivery to any third

person not connected with the company; that they were delivered to a stranger, and were, therefore, escrows; and being so, the title to the lots remained with the grantors, subject to be transferred on the delivery of the bonds and mortgages. It is generally true, and is the old doctrine of the books, that if a deed is delivered to a stranger to be delivered to the grantee, on the performance by him of certain conditions, and they are fully performed, and the deed delivered, that the deed takes effect upon the second delivery, and to be considered the deed of the party from that time.

This rule, it is said, does not apply, where justice requires a resort to fiction. 4 Kent's Com., 454.

The instances usually put are when the grantor, after [34] the deposit of the deed as an escrow, dies, or becomes insane, or, if a *feme sole*, marries before the grantee has performed the conditions, in such cases the law will make the second delivery relate back to the time of the deposit of the escrow. 1 Shep. Touch., 123. What effect the agreement of the parties should have upon the time of the delivery is not there discussed, nor is it said these are the only instances in which there shall be this relation back.

The case of *Lessee of Shirley v. Ayres*, 14 Ohio, 307, was an ejectment, where it was held a deed delivered as an escrow should take effect on its first delivery, on the performance of the condition, if it was necessary to protect the grantee, or those claiming under him, against intervening rights.

The case of *Beekman v. Frost*, 18 Johns., 543, in the court of errors, holds the same doctrine. A very strong case is to be found in 9 Mass., 307, *Hatch et al. v. Hatch et al.*, where the court held that a writing delivered to a stranger for the use and benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. The distinction, however, the court say, being almost entirely nominal when we consider the rules of decision which have been resorted to, for the purpose of effectuating the intentions of the grantor or obligor in some cases of necessity. If delivered as an escrow, and not

in name as a deed, it will, nevertheless, be regarded and construed as a deed from the first delivery, as soon as the event happens, or the consideration is performed upon which the effect had been suspended, if this construction should be then necessary in furtherance of the lawful intentions of the parties.

The case of *Hall v. Harris*, 5 Ired. Eq. R., 303, is to the same effect. The question in this case was, whether a deed took effect on the second day of March, the date of its execution, or on the tenth, the day on which full payment for the land was made. The trade was made on the second of March, on which day part of the price was paid, and the vendor [35*] was to make a deed *and hand it to one Morgan, to be by him handed to the vendee when he paid the price. On that day the vendor made the deed and handed it to Morgan. Afterwards, on the tenth of March, the vendee paid Morgan the balance due and received the deed. The purpose, the court say, for which the deed was delivered to a third party instead of being delivered directly to the plaintiff, was merely to secure the payment of the price. When that was paid the plaintiff had a right to the deed. The purpose for which it was put into the hands of a third person being accomplished, the plaintiff then held the deed in the same manner he would have held it if it had been delivered to him in the first instance. This was the intention, and we can see no good reason why the parties should not be allowed to effect their end in this way. Though the plaintiff might have avoided the purchase, his rights cannot be affected by that fact. The court remarks, if the vendor had died after the delivery to the third person, and before the payment, the vendee, upon making the payment, would have been entitled to the deed, and it must have taken effect from the first delivery, or it could not have taken effect at all. The intention was, it should be the deed of the vendor from the time it was delivered to the third person, provided the condition was complied with. If this intention is *bona fide*, and not a contrivance to interfere with the right of creditors, the deed must be allowed to take effect. The court conclude by saying, we are satisfied from

principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person to be handed to another, upon a condition which is afterwards complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention that it should not then become a deed.

In the case before us the proof was that the deeds were delivered, as deeds, to the solicitor of the company, with the understanding, when the bonds and mortgages of the railroad *company to be given in payment of the lots, [36*] and which had to be executed in a distant state, were returned from there, the deeds were to take effect as of May 1, 1860; and if the bonds were not returned, the deeds were not to take effect at all; that the bonds were not returned until the fall of 1860, and that he, the witness, should not have delivered or recorded the deeds until the bonds came; that the bonds and mortgages are dated and bear interest from May 1, 1860, and interest had been paid on them from that date. It is a case quite like the case of *Hatch v. Hatch*, decided by the supreme court of Massachusetts, and the case in Iredell decided by the supreme court of North Carolina. In all such cases the intention of the parties is to be considered, and it seems quite manifest these parties intended those deeds should have effect from the day of their execution, if the conditions were performed; and they were fully performed.

But were these deeds delivered to a stranger, so as to constitute an *escrow?* The proof is, they were delivered to the solicitor of the company. Now, since a corporation can only act through its officers and agents, a delivery of a deed to one of its officers would be a delivery to the company, and therefore would take effect immediately. *Foley v. Cowgill*, 5 Blackf., 20; *Worrall v. Munn et al.*, 1 Seld. (N. Y.), 229.

The case cited by appellant from 4 Fla., 359, *Southern Life Ins. and Trust Co. v. Cole*, holds that a delivery to an officer or servant of a corporation, is delivery to the corporation, with the addition that such delivery is for the use and

benefit of the corporation, and with an intent to pass an absolute property or interest in the deed delivered. That court did not think there was such a personal identity between the corporation and its officers, that a deed may not be placed in the hands of the latter as an escrow until the performance of some condition. The court, however, in that case, refused to permit the deed to take effect in favor of the company from its date, because it would do wrong and injustice to the rights of other parties.

[37*] *The question of intention in the case before us was left to the jury, and they have found the deeds, by agreement of the parties, were to take effect on the first day of May, 1860, and it is not pretended, any rights or interests have intervened to be injuriously affected by such an agreement. Justice is done by it, because the plaintiffs have paid the interest on these bonds and mortgages from the first day of May, 1860, at which date, all claim and interest of their vendors ceased, and so ceasing, the plaintiffs became entitled to the rents and profits of the tenancy, then existing and theretofore created. A suit brought by these vendors, for the rent of these premises, could not, under the facts proved, be maintained. They sold the premises on a condition which has been fully performed with an express agreement, when performed, their deed should take effect on the first day of May. They could not afterwards retract this, nor could any other person, except, perhaps, creditors, gainsay the validity of such an agreement in the absence of fraud. We are inclined to think the delivery of these deeds, under the circumstances, was absolute in the first instance.

As to the instructions, they have received careful consideration. There were two given on behalf of the plaintiffs, fully and clearly stating the law on the evidence. *McKinney v. Peck*, 28, Ill., 174; 4 Kent's Com., 112.

The views we have presented dispose of the first and second instructions asked by the defendant. The deeds took effect from the first day of May, 1860. The condition was not, on the first delivering of the deeds, that they should not then

"take effect," but that they should not be recorded, or be made use of, until the bonds and mortgages were returned from Pittsburg.

As to the third instruction, it seems not applicable to the case, as the evidence shows that the agreement made by defendant with Cobb related as well to the year 1860 as to 1859. The defendant would be considered as holding over in 1861 on the terms agreed upon with Cobb.

The modification of the fourth and fifth instructions of defendant were correct. There was no such eviction, or any*thing equivalent to it, as would take away the [38*] landlord's right to rent for the part actually occupied. If, as the court said, it was the understanding that the railroad track might be put across the lots, in the event the company purchased them, and defendant held under that understanding, the putting down the track after the purchase would not amount to an eviction. Forcible expulsion was not necessary, but any act done in violation of the rights of the tenant, without his consent might amount to an eviction.

The instructions, eight in number, given by the court for the defendant, placed his case in an attitude as favorable as the facts would warrant.

The plaintiffs' instructions make no point as to the time their title accrued, and those of the defendant limit the right of the recovery to the time subsequent to the execution of the bonds and mortgages, and the deeds placed upon record, passing by entirely, the agreement of the parties as to the time when the deeds should take effect.

The court then did not, in any of the instructions given, or by indirection in refusing other instructions, decide that the title to land can be carried back by parol. That point was not made in the court below, and is not, therefore, determined by the instructions. One of the deeds was not acknowledged until the 14th of May, but it was executed on the first. No point, however, was made on that.

Perceiving no error in the record, the judgment must be affirmed. Judgment affirmed.

THOMAS MILNOR vs. E. W. WILLARD et al.

CONTRACTS FOR THE PURCHASE OF LAND: *Time, when of the essence of the contract.*[1]

In contracts for the purchase of land, time is not considered as necessarily of their essence; but it may be made essential by an express stipulation of the parties, or it may be deemed so from the nature of the property or the purposes for which it was purchased, or from other circumstances specially surrounding the case. The precise phraseology in which such an agreement is expressed is not important. The essential element of the agreement on the part of the vendee is, that he undertakes to make payment of the purchase money at the very time stipulated as a condition to the continuance of his rights under the contract. (See a variety of forms of stipulations stated in the opinion. The stipulation was express in this case.)

SAME: *Poverty of purchaser, no excuse for non-performance.*

Where in a bill for the specific performance of a contract for the purchase of land, wherein time of payment was made of the essence of the contract, the only reason alleged for relief from the effect of non-performance by failure to pay at the stipulated time, was that complainant was a poor man, and at that time unable to comply with his contract: *Held*, that the alleged excuse was insufficient.

APPEAL from Superior Court of *Chicago*.

The case is sufficiently stated in the opinion.

Blodgett & Winston, for appellant. *Mather & Taft*, for appellee.

[39*] *BECKWITH, J. This is a suit in equity to enforce the specific performance of a contract for the purchase of lot one in block two of Duncan's Addition to Chicago. On the 15th day of June, 1854, the defendants, Willard and Lind, made a written agreement with the trustees of the South Chicago German Church for the sale of the lot for the sum of four thousand dollars, payable four hundred dollars in cash, and the balance in five equal annual installments on the 19th

[1] See Tyler *v.* Young, 2 Scam., 444; Dennis *v.* McCagg, 32 Ill., 429; Wynkoop *v.* Cowing, 21 id., 571; Cunningham *v.* Ill. Cent. R. R. Co., 77 Ill., 178; Morgan *v.* Herrick, 21 id., 481; Glover *v.* Fisher, 11 id., 666; Bishop *v.* Newton, 20 id., 180; Murphy *v.* Lockwood, 21 id., 611; Heckard *v.* Sayre, *post*, 142; Sanford *v.* Emory, *post*, 468.

day of June in each year, with interest annually in advance on all sums unpaid. The purchasers paid on the contract $1,542.59, and on the 12th day of June, 1855, assigned it to the complainant, who, after that time, paid thereon $2,673.96, leaving due thereon the last payment, falling due June 19, 1859, and the interest thereon.

The contract provides that the prompt performance of the payments and covenants, on the part of the purchasers should *be a condition precedent to the sale, and that [40*] time should be of the essence of the condition. On the 1st of April, 1861, Lind conveyed his interest in the lot to Willard, as security for an indebtedness of the former to the latter. The other defendants claim under them. On the 6th day of October, 1861, Willard declared the contract forfeited, for the nonpayment of the residue of the purchase-money. On the 19th of April, 1863, the complainant tendered to Willard the sum due on the contract, with interest, and demanded a conveyance. The bill in the present case was filed May 2, 1863. The complainant seeks relief from the effect of a nonperformance of a condition precedent, and the only reason alleged for such relief is, that he was a poor man, and at that time unable to comply with his contract. The alleged excuse cannot be considered sufficient. If it were valid for a short period of time, it would be sufficient until it ceased to exist, and such excuses would postpone indefinitely the time when contracts are to be performed. In contracts relating to land, time is not considered as necessarily of their essence, but it may be made essential by an express stipulation of the parties, or it may be deemed so from the nature of the property or the purposes for which it was purchased, or from other circumstances specially surrounding the case. Time is made essential in contracts by various forms of stipulations to that effect; one of which is an agreement that the prompt payment of the money shall be a condition precedent and that time shall be considered as of the essence of the condition, without any formal stipulation in regard to a forfeiture or the right of the vendor to declare the contract forfeited if

the condition is not complied with. Another form of stipulation by which time is made essential is an agreement that if the money is not promptly paid, the contract shall be null and void. This was the form of the agreement in *Smith v. Brown*, 5 Gilm., 314, and in *Kemp v. Humphreys*, 13 Ill., 573.

Still another form of stipulation, by which time is made material, is an agreement that if the vendee shall make default, the contract may be declared void at the option of the vendor.

[41*] *The cases of *Steele v. Biggs*, 22 Ill., 655, and *Chrisman v. Miller*, 21 id., 227, were in regard to agreements in this form.

We do not regard the precise phraseology in which such an agreement is expressed as important. The essential element of the agreement on the part of a vendee is, that he undertakes to make payment of the purchase money at the *very* time stipulated as a condition to the continuance of his rights under the contract. Where there is no special provision in regard to the termination of the rights of the vendee, they cease *ipso facto* upon his noncompliance with his agreement; but cases may arise where, from the peculiar phraseology of the agreement, providing for the termination of his rights, an election so to do, on the part of the vendor, might be necessary. But in the case under consideration, time was made essential in plain and unambiguous language, and the performance of that part of the contract was made a condition precedent to the obligation of the vendor. Lands in this country are an article of commerce, and parties making contracts for their sale rely upon the obligations of purchasers as a means by which they are enabled to transact business. Promptitude in the discharge of such obligations is as essential as in other commercial transactions; and justice to the vendor requires that such obligations should be literally complied with, unless the stipulation in regard to time is waived, or there is some just excuse for a noncompliance. While courts will relieve from forfeiture in cases where it has been incurred with-

out fault, yet they have never undertaken to declare immaterial the time when a contract is to be performed, when the parties have agreed that it should be otherwise.

The decree of the court below is affirmed.

Decree affirmed.

Minard L. Waterman vs. Reuben Raymond. [42]

Evidence: *Copy of record of survey by county surveyor, certified by his successor, admissible.*

In an action to recover a penalty for obstructing a public highway located on a section line, in which the whole controversy is as to the location of the line, a copy of the record of a survey of an adjoining section, made by a county surveyor since deceased, and duly certified by the subsequent incumbent of the office, which tends to establish the common corner of four sections, forming one end of the line in dispute, is, under the statute (Rev. Stat. 1845, 524, sec. 7) providing for the recording of surveys, and that a certified copy of a survey under the hand of the county surveyor shall be admitted as *prima facie* evidence in any court of record of this state, admissible in evidence, and it is error to exclude it.

Error to Circuit Court of *Kendall* County.

The case is sufficiently stated in the opinion.

Gray, Avery & Bushnell, for plaintiff in error. *Dickey & Wheaton*, for defendant in error.

Walker, C. J. This was an action commenced be- [45]
fore a justice of the peace, to recover a penalty for obstructing a public highway. It resulted in a judgment against plaintiff in error, who prosecuted an appeal to the circuit court, where the cause was tried before the court and a jury, when a verdict was found against him, and judgment was rendered upon the verdict, from which this writ of error is prosecuted. There are numerous errors assigned upon the record, only one of which we deem it necessary to consider.

On the trial below, plaintiff in error proved the death of Thomas A. Henry, a former county surveyor. He then of-

fered his original book of the minutes of surveys, which the court refused to admit in evidence, and exception was taken. He then offered the certificate of a survey made by Henry as county surveyor, of section eighteen, taken from the original records of surveys in the county surveyor's office, and duly certified[1] to be a correct copy from the original, but it was likewise rejected by the court, and exceptions were taken. The complaint charges, and the whole controversy grows out of the obstruction of a road located on the west line of section twenty. The survey and location of the road calls for that line, and when that can be ascertained, the question as to whether the road was obstructed becomes of easy solution. But owing to the obliterating effects of time, the difference in the memory of witnesses, and the impossibility of reducing the principles of mathematics with accuracy and precision, to practical application, we find in this, as in many other cases, that the identification of a corner, or the tracing of a line of a survey, long since made, is attended with difficulty, and its correctness is hard to demonstrate.

But inasmuch as the section course [corner] of seventeen, eighteen, nineteen and twenty is common to each, and forms one end of the lines dividing those sections, it is important to ascertain its precise location and identity. The line [46*] between nineteen *and twenty being in dispute, if the original course [corner], common to each of these four sections is found and established, the north end of the line between nineteen and twenty would thereby be ascertained, and this would necessarily aid largely in ascertaining the original line between sections nineteen and twenty. In this view and for this purpose, any legitimate evidence tending to establish the common corner to these four sections would be eminently proper, and should be admitted.

The seventh section of the act regulating the duties of surveyors (R. S., 524) provides that each county surveyor shall provide himself with a well bound book in which to note each survey made by him. He is required to carefully note the

[1] By the then county surveyor.

same therein, giving the name of the person, the survey of whose land is so recorded, and describing as near as practicable, the metes and bounds, and note the date of the survey. It also declares that such record shall be open to inspection by every person who may think himself interested. It also provides that a certified copy of the survey, under the hand of the surveyor, shall be admitted as *prima facie* evidence in any court of record in this state. Now, it appears that Henry was a county surveyor, who made the entry in the discharge of his official duty, and in the mode required by the statute. The copy of the minutes of that survey was duly certified by the county surveyor, and this copy tended to prove the issue, and was *prima facie* evidence, and the certificate should have been admitted. In rejecting this evidence the court below erred, and the judgment must be reversed and the cause remanded.

Judgment reversed.

THE PEORIA MARINE AND FIRE INSURANCE COMPANY vs. ROBERT HERVEY et ux.

FIRE INSURANCE: *Policy not assignable; parties plaintiff.*

A fire insurance policy is not assignable so as to enable the assignee to bring suit upon it in his own name.[1]

SAME: *Where there is a new contract with the assignee of the policy.*

But where the owner of the insured property, upon the sale of it by him to the plaintiff, with the consent of the insurers, assigned the insurance policy thereon (which was under seal) to the plaintiff, and the insurance company, in consideration of the payment of a certain premium by the plaintiff, issued to him a receipt stating that the insurance company, in consideration of such payment by the holder of said policy, thereby consented to the continuance for one year of the

[1] See New Eng. F. & M. Ins. Co. *v.* Wetmore, 32 Ill., 221; Dix *v.* Mercantile Ins. Co., 22 id., 272; Illinois Fire Ins. Co. *v.* Stanton, 57 id., 354 (insurance by mortgagor, loss, if any, payable to mortgagee); Commercial Ins. Co. *v.* Treasury Bank, 61 id., 482; Phœnix Ins. Co. *v.* Mitchell, 67 id., 43; See, however, City Fire Ins. Co. *v.* Mark, 44 id., 482 (garnishment).

risk originally issued in said policy, the original application to remain in full force and virtue: *Held*, that this constituted a new contract with the plaintiff for a valuable consideration paid, and in the terms of the original policy; and that, admitting that the assignee could not sue upon the original policy assigned, still, this being a new contract with the plaintiff, he could maintain assumpsit upon it in his own name.

Appeal from Superior Court of *Chicago*.

The case is sufficiently stated in the opinion of the court.

Scammon, McCagg & Fuller, for appellant. *Hervey, Anthony & Galt*, for appellees.

[61*] *Breese, J. This was an action of assumpsit originally commenced by Mrs. Frances W. Smith, who, during the progress of the suit, intermarried with Robert Hervey, the plaintiff, and against the Peoria Marine and Fire Insurance Company. A verdict was rendered for the plaintiff, a motion for a new trial overruled, and the case brought here by a writ of error on the bill of exceptions. The declaration contained three counts; the first, after reciting the issuing of an insurance policy by the defendant to one Bishop, the terms thereof, etc., goes on to allege that Bishop, being sole owner of the property insured, on the 22d of October, 1859, sold and delivered the insured property to the plaintiff (then Mrs. Smith), and that on that day Bishop, with the consent of the defendants, manifested and expressed by their indorsement on the policy, assigned the same to the plaintiff. It is then averred that on the 22d October, 1859, the defendants executed a renewal certificate in writing, and delivered it to the plaintiff, and that in consideration of the sum of forty-five dollars, paid by plaintiff, as premium, to the defendants, at their request, and of the undertaking and promises by the plaintiff to perform and fulfill all things contained in the policy to Bishop, on her part to be performed, etc., the defendants undertook and promised the plaintiff to consent to a continuance of the risk originally insured from October 22d, 1859, to October, 1860, and to become and be insurers to the plaintiff of the sum mentioned in said policy upon the prop-

erty, and to fulfill all things mentioned in the policy, on the part of the company, to be performed and fulfilled; it then avers that the defendant became and was insurer to the plaintiff, and by its president and secretary subscribed the renewal certificate as such insurer upon the property. It is then alleged that the plaintiff remained owner until the loss by fire during the continuance of the term of the risk, and *notice to the defendant. The delivery by plaintiff to [62*] the defendant, on the 14th September, 1860, of her amount of loss, properly verified, is also alleged, and also the delivery of the certificate of the notary, as to his examination into the circumstances of the loss, and the amount thereof. The second count sets out the making of a certain instrument in writing and agreement by defendants with the plaintiff, known as a policy of insurance, and delivered the same to plaintiff on October 22, 1859, and avers that in consideration of the payment by plaintiff, at the request of the defendants, and to defendants, of forty-five dollars as premium for insurance of eleven hundred and twenty-five dollars on a stock of drugs and other property mentioned, and the undertaking and promising by plaintiff as in first count, and defendant undertook and promised plaintiff to become and be insurer to her of that sum upon the stock mentioned for one year, etc., and then avers as in the first count.

The third count sets out the making by the defendant, on the 22d October, 1859, of a certain agreement with the plaintiff, and that, in consideration that the plaintiff had paid premium for insurance, and had undertaken and promised to perform and fulfill the agreement on her part, the defendants undertook and promised to become and be, and became and were the insurers to the plaintiff upon the property mentioned, for the term of one year from October 22, 1859, and avers a promise on the part of the defendants to perform and fulfill all things in the agreement on its part; it then avers sole ownership up to the time of the loss by fire on the 19th of August, 1860, and avers the delivery of the preliminary proofs, etc.

The common counts were added, and the breach assigned in the usual form.

The appellants make several points against the right of the plaintiff to recover in this form of action.

He contends that the policy of insurance issued to Bishop, is the only contract of insurance in the case, and that the plaintiffs cannot maintain an action on it in their own names, as assignees of Bishop; that a fire insurance policy is [63*] not *assignable so as to enable the assignee to bring suit upon it in his own name.

The last propostion is admitted but the first cannot be admitted. This action is not brought, nor does it profess to be brought on the policy issued to Bishop. That policy is referred to in the first count, as inducement, merely, to the contract, alleged to have been made with the plaintiff as set out in third count; it is in no sense the ground of the action. The third count sets out simply, an agreement with the plaintiff on a sufficient consideration, to do certain acts. If the action was on the policy issued to Bishop, the authorities cited by the appellants would be decisive, as that was under seal, and this action is in assumpsit.

The question before us is correctly put by the counsel for the appellee: Can the plaintiff recover of this insurance company in her own name, the amount of damages which they, as an insurance company, undertook and promised to pay her, in case the property insured was destroyed by fire? Did the company enter into such a contract, on a valuable consideration with the plaintiff? The fact that they had, the year previous, insured the property for Bishop and that he assigned the policy to the plaintiff, does not, we think, affect, one way or the other, the real question stated above, and presented by this record. The plaintiff paid her money on the promise of the company to keep the property insured for one year, and gave a receipt therefor. That receipt is as follows:

Policy No. 723. Renewal No. 1,721.

By this certificate the Peoria Marine and Fire Insurance Company, in consideration of forty-five dollars to them paid

by the holders of policy No. 723, the receipt whereof is hereby acknowledged, do hereby consent to the continuance of the risk originally issued in policy No. 723, from the twenty-second day of October, 1859, to the twenty-second day of October, 1860; the original application to remain in full force and virtue.

The meaning of this writing is quite obvious. It acknowledges there is a holder of policy No. 723, who might be a per*son other than Bishop; that a risk had been [64*] theretofore taken on the property in question, and declares, by the words, "the original application under which the risk was originally taken, to remain in full force and virtue," that the then holders of the policy need not make any new or additional application to the company for insurance, but the company would consider it as made by him who paid the money, and as on the terms of the original application. It amounts simply to this: that on the plaintiff going to the insurance company with the policy issued to Bishop in her possession, of which she was then the holder, on seeing it, the defendants, by their agent, say to her that she need not make a new application for insurance; that they would continue the risk for her benefit one year, on the payment by her of forty-five dollars. That had no effect upon the written policy of Bishop to continue it alive or to revive it, being dead, but it was a new contract with the plaintiff for a valuable consideration paid, and on the terms of the original policy.

Now, admitting that the assignee could not sue upon the policy if assigned, still, on the general principles of the common law, this being a new contract with the plaintiff, she could sue upon it in her own name.

If a person executes his note to another, which is not negotiable, and had been assigned in fact to a third party, and is held by him, and the maker promises and agrees with such party to pay the note to him, what principle of law is there to prevent a recovery by suit in his own name, and show the note and prove the facts which were the inducement to the promise? We know of none. This doctrine has been recognized in

several cases. In *Mowry v. Todd*, 12 Mass., 288, it was held, PARKER, Ch. J., delivering the opinion, that if the principal contract which is declared upon was duly assigned to the plaintiff so as to give him the equitable interest and entitle him to an action in the name of Fisher (the payee), we have little doubt that an express promise made to him by the defendant gives him a right of action in his own name upon that promise. The court say, whatever may be the [65*] effect of handing over a *written contract to a party to whom it is intended to be transferred *without* a recognition of the transfer by the person bound by the contract, and a promise to pay the contents to the holder, we are satisfied that *with* such a recognition and promise, the assignment is sufficient without the name of the assignor. It amounts to the substitution of one creditor for another, by the two creditors and the debtor; and an action may be maintained by such assignee in his own name, founded on the assignment and the express promise of the debtor to pay him.

The only question of difficulty the court found in this case was, whether the contract or undertaking of Todd, the maker of the note, to the payee, Fisher, was duly assigned to Mowry, the plaintiff. It appeared clearly to have been the intention to assign it; a valuable consideration was paid, and the written evidence of the contract was delivered over to the plaintiff, but Fisher had not signed his name on the back, although words of transfer were written for the purpose of having his signature, and the omission was accidental, and not by design.

In principle, it is precisely analogous to this case in many respects; this case being stronger, because Bishop had actually assigned the policy, with the consent of the defendant, the ratification thereof not being indorsed, by accident and not by design.

In support of the doctrine, reference is made to *Fenner v. Meares*, 2 Wm. Bl., 1269. This was a case in assumpsit, for money had and received, brought by the assignee of a *respondentia* bond, the obligor therein having, beforehand, engaged,

by an indorsement to pay the same to the assignee. Though this decision was questioned by Lord KENYON, and Lord ELLENBOROUGH said he had read it twice and must read it again before he assented to it, we cannot find that it has ever been overruled.

In *Smith v. Berry*, 18 Maine, 122, the court held that where a note, not negotiable, was assigned to a third party, such party might maintain an action in his own name, on the express promise of the maker to pay him the note.

To the same effect is the case of *Warren v. Wheeler*, 21 id., 484.

*In *Hodges v. Eastman*, 12 Vt., 358, it was held [66*] that the assignee of a note not negotiable may maintain an action in his own name when the assignment is for a valuable consideration, and where the debtor promises to pay the assignee.

In *Blanchard v. Waite*, 28 Maine, it was held, in an action of assumpsit on a contract of insurance, that such contract is completed when there is an assent to the terms of it by the parties, upon a valuable consideration. See, also, to the same effect, *Scott v. Lancaster*, 3 Harris and Johns., 441; *Barger, Ex'r, v. Collins*, 7 id., 213; *Mathews v. Houghton*, 11 Maine, 377.

Other cases to the same effect might be cited, but it is unnecessary; the principle is too obvious for argument or illustration. The action is brought on the new agreement and promise, which, having been made for a valuable consideration paid, is binding on the defendants and can be enforced. The original policy has been assigned, and with the consent of the defendants; and out of that assignment and the payment of forty-five dollars as premium, originated the promise to continue the risk one year, and incorporated into it, by reference, all the stipulations and conditions of the original policy, as if they had been formally set forth and repeated. *Ford v. Canfield*, 6 Halstead, 327.

The case of *Flanagan v. Camden Mutual Insurance Co.*, 1 Dutcher (N. J.), 506, is much in point. There it was held,

that at common law, an action will not lie on a policy of insurance in the name of the assignee; but if, upon a transfer of the premises insured, the policy is assigned to the purchaser and assented to by the insurer, it constitutes a new and original promise to the assignee, upon which an action may be maintained in his own name.

The same doctrine was held in *Wilson v. Hill*, 3 Metc., (Mass.), 69, and in *Jessel v. Williamsburg Insurance Co.*, 3 Hill (N. Y.), 88; *Benjamin v. Saratoga Mutual Fire Ins. Co.*, 17 N. Y., 415, if there was an express promise by the insurer to pay the assignee in case of loss. See, also, *Wood v. Rutland and Addison Fire Ins. Co.*, 31 Vt., 552.

[67*] *On principle and authority, we think the action is well brought in the name of the assignee to whom the promise was made.

It is said by appellant that this case is like that of *Herron v. This same Company*, 28 Ill., 236, where this court held that the renewal receipt in that case did not make a new contract of insurance, and that an action for a loss should be brought on the original policy. That was a case in which the plaintiff was the original party to the policy, and the renewal receipt to him made no new contract with him, he then being the owner of the property insured.

The reference by appellant to 2 American Leading Cases, 432, to establish the principle that the assignment of the policy does not appear to operate as a new promise founded upon the former consideration, is all very well, but when it is founded upon a new consideration moving from the assignee, the case is very different, as is seen by the authorities cited.

We are well satisfied the recovery was proper in this action, and accordingly affirm the judgment.

Judgment affirmed.

John M. Tarble vs. Lester Underwood.

Witnesses: *Interest.*[1]

In an action to recover the value of a corn sheller, for which an order had been drawn by the defendant in favor of plaintiff upon a third party, and which the plaintiff claimed the drawee refused to accept, the drawee of such order is a competent witness for defendant to prove the acceptance thereof.

Appeal from Circuit Court of *La Salle* County.

The case is sufficiently stated in the opinion of the court.

Gray, Avery & Bushnell, for appellant. *D. P. Jones*, for appellee.

Beckwith, J. This is a suit to recover the value of [68] a corn-sheller mentioned in an order drawn by the appellant, in favor of the appellee, upon H. C. King & Co. The appellee claims that King & Co. refused to accept the order. On trial, the appellant offered H. C. King, one of the firm of King & Co., to prove the acceptance of the order, and his testimony was excluded. If the firm of King & Co. were liable to the appellant for a machine, it was immaterial to the witness whether his firm remained liable to the appellant or became liable to the appellee; and if this firm was not so indebted, the witness was called against his interest. The evidence was improperly excluded, and the judgment of the court is therefore reversed and the cause remanded.

Judgment reversed.

[1] By statute, interest no longer disqualifies a witness, but only goes to his credibility. Rev. Stat. 1874, 488.

Hiram Cooley vs. Jacob P. Willard et al.

Agency: *Authority to loan confers no authority to collect.*

Authority to an agent to loan the money of his principal and take security for its payment does not authorize the agent to collect his principal's money so loaned by him.

Same: *Same.*

Nor in such case can the authority to collect the money be inferred from the fact that power of attorney and deed of trust, given to secure its payment, were taken in the name of the agent.

Same: *Same; receipt of interest by agent making a loan.*

Nor, in the absence of evidence of other collections having been made by him for the holder, does the fact that in such case the debtor paid the several installments of interest, as they fell due, to the agent who made the loan, who paid them to the holder of the note, who indorsed them upon the note in his hands, as paid by the hand of the person so receiving them, establish an authority to receive the principal, but is as much evidence that he was the agent of the debtor as of the creditor. And if the principal debt is paid by the debtor to such person, who fails to pay it over to the holder, the loss must fall upon the debtor.

Appeal from Circuit Court of *Will* County.

The case is sufficiently stated in the opinion of the court.

Snapp & Breckenridge, for appellant. *Geo. F. Bailey*, for appellee.

Walker, C. J. This bill was exhibited to enjoin [73] the collection of a judgment upon a note alleged to have been previously paid, and to compel the note and deed of trust given to secure its payment to be surrendered to complainant. It appears that Paschal Woodward, acting for appellee, loaned to appellant the money, took his note,[1] with a power of attorney to confess a judgment in case of a default in its payment, and also a deed of trust on real estate as security for the sum thus loaned. It likewise appears from the evidence that appellant paid the several installments of in-

[1] This note was payable to Jacob P. Willard or order, at the office of P. Woodward, in Chicago.

terest, as they fell due, to Woodward, who paid them to appellee, who indorsed them upon the note as paid by the hands of Woodward. Appellant, at the maturity of the note, paid the entire sum necessary for its satisfaction to Woodward, who agreed to get the note and deliver it to him. But he never did, nor did he pay the money to appellee.

There is no proof that Woodward was authorized to receive this money, but that was attempted to be shown by proof that he was appellee's general agent. The witness S. W. Woodward testified that it was his impression that Paschal Woodward loaned and collected money for appellee, in numerous instances. He was, however, only able to give the names *of persons to whom he had loaned money, but [74*] could name no person of whom he had made collections, except appellant. Appellee denies such authority by his answer, and we think this evidence fails to establish such authority. It may show a general agency to loan money and take securities for its payment, but not to collect for appellee. The fact that he received the money of appellant and paid it to appellee is as much evidence that he was the agent of the former as the latter.

Nor can it be inferred, because the power of attorney and the deed of trust were given to Woodward, that he was empowered to collect the money. Such is not claimed to be the effect of such instruments, unless it is so expressed in them. Appellant having entrusted Woodward with the money, if designed as a payment, he should have looked to his authority before he gave him the money, and if he had no such authority, the risk was his, and not appellee's. Had he called for and insisted upon the production of the note, he would have learned that it was not in Woodword's possession, which would have been sufficient to put him upon his guard. It is a familiar rule, that where one of two innocent persons must suffer loss, through the wrong of another, the party who enabled the person to commit the wrong must sustain the injury. In this case appellant enabled Woodward to appropriate this money to his own use, and failed to see whether he was authorized to receive

it, and must, therefore, submit to the loss. No reason is perceived for reversing the decree of the court below, and it is therefore modified, so as to dismiss the complainant's bill without prejudice, and, as modified, the decree is affirmed.

Decree modified.

Hezekiah H. Gear and A. Hamilton Gear vs. John H. Bullerdick.

Ferries: *Forfeitures under the general law must be declared by some judicial proceeding.*

By section 11 of the general law regulating ferries (Scates' Comp., 526; Rev. Stat, 1845, 235), making a person running a ferry without authority within three miles of an established ferry, liable to forfeit his boat to the owner or proprietor of a ferry established under the provisions of that act, or confirmed as such by the tenth section of said act, and authorizing the proprietor "after a forfeiture had occurred, to enter upon and take possession of the boat or craft to his own use," the legislature did not intend the forfeiture should be declared by the party injured; and the proprietor of the established ferry cannot lawfully take possession of the boat till this is done by some judicial proceeding; and if he takes possession without a forfeiture having been declared by some court of competent jurisdiction, his taking will be tortious.

Same: *Party acting under a special charter cannot enforce a forfeiture under the general law.*

A person not claiming a ferry franchise under the general law, but under a special act conferring no power to declare a forfeiture for running another ferry at the same place, can not resort to the summary remedy conferred by the general law, and has no right to seize and detain the boat of another person running to the same landing; but, if he has an exclusive franchise, must seek his remedy at the common law.

Same: *Forfeitures under the general law not applicable to ferries across the Mississippi river.*

The forfeiture imposed by the general law regulating ferries, for running a ferry within three miles of an established ferry, was only intended to apply to parties who should, without authority, run and operate ferry boats across the rivers of this state, and does not apply to one licensed by the proper authority in the state of Iowa to run a ferry

from a landing in Iowa to the Illinois shore. The middle of the main channel of the Mississippi being the boundary between the two states, the authorities of Illinois have no greater right to grant a franchise, to be enjoyed beyond its boundary, than Iowa has to grant one to be enjoyed beyond its boundary, and for an injury to the proprietor licensed in this state, or a trespass upon his landing by the party licensed in Iowa, he must seek his remedy at the common law, and not by seizure of the boat; and if he seizes the boat, replevin will lie for its recovery.

APPEAL from Circuit Court of *Jo Daviess* County.

The case is sufficiently stated by the court.

M. Y. Johnson, for appellants. *A. L. Cummings*, for appellee.

BREESE, J. This was an action of replevin in the [97] Jo Daviess circuit court, brought by the defendant in error against the plaintiff in error, for a horse ferry boat.

The facts of the case are briefly these: On the 18th of January, 1840, the general assembly of this state passed an act to authorize H. H. Gear to keep a ferry across the Mississippi river. It is of one section, and provides that H. H. Gear of the county of Jo Daviess be authorized and licensed to keep a ferry across the Mississippi river at and from a point on said river in that county and opposite the mouth of of "Tete de Mort," in the territory of Iowa, and that he and his heirs and assigns should have the right of having, maintaining and using a ferry across that river at the place mentioned, and to have and to receive all advantages and emoluments arising from the use of the ferry for the term of ten years, provided that the county commissioners' court of Jo Daviess shall have the right to assess an annual tax upon the ferry equal to that levied upon other ferries similarly situated in that county. By an amendatory act passed February 8, 1849, the term was extended to thirty years.

On or before the 10th of August, 1862, the county authority of Jackson county, Iowa, licensed the plaintiff, now appellee, to operate and run a ferry from Whiteside's landing, in Jackson county, across the Mississippi river to the state of

Illinois, and to carry freight and passengers, cattle and teams, from that landing, in Iowa, to Jo Daviess county in this state.

Under this authority, the plaintiff procured a ferry boat [98*] and ran it *from Whiteside's landing to the Illinois shore, at defendant's landing, and received the usual rates of fare from the Iowa side, and, occasionally, from passengers from the Illinois side.

The defendant deeming this an infraction of his franchise, which he claimed to be exclusive for three miles up and down the river, forcibly seized, and took into his possession, the plaintiff's ferry boat and moved it to Galena and there kept and detained it, refusing to deliver it up on demand made by the plaintiff. Hence the action.

Without considering the pleadings or evidence in the cause, or the specific errors assigned, or the instructions, it is only necessary to say, that by the defendant's charter, he had no right to seize the plaintiff's boat. Under the general law regulating ferries, by section eleven (Scates' Comp., 526), a person running a ferry within three miles of an established ferry, without authority, was liable to forfeit his boat to the owner or proprietor of a ferry established under the provisions of that act, or which had been confirmed as such by the tenth section of the act. Ferries growing out of that law had the rights and privileges granted by it on the proprietor complying with its provisions, one of which rights and privileges was, "after a forfeiture had occurred, to enter upon and take possession of the boat or craft to his own use." The legislature did not intend the forfeiture should be declared by the party injured. That must be done by some judicial proceeding, and when done, the proprietor of the established ferry could take possession of the boat. No man can be a judge in his own cause. If permitted, violence and bloodshed would be the consequence. Without a forfeiture having been declared by some court of competent jurisdiction, the taking by appellant of this boat was wrongful and tortious.

But, we do not conceive, the appellant can resort to this summary remedy as he claims not the franchise under the

public law, but by and under the act we have quoted, by which act no power to declare a forfeiture is given to him, nor is any exclusive right for any distance, either up or down the river, bestowed upon him. His remedies, if he has an exclu*sive franchise, must be found in the rules of [99*] the common law, which are ample and efficacious in his case.

But it may be observed further, that if the appellant's franchise is governed by this public law, then it must be considered that law only intended to reach parties who should, without authority, run and operate a ferry boat across our rivers. Now the appellee was not in this predicament. He showed a license from the proper authority in Iowa to establish this ferry, and run his boat from Whiteside's landing in Iowa to the Illinois shore. This authority is deserving of the same respect and consideration, and is entitled to equal efficacy with the authority granted by this state to the appellant. The middle of the main channel of the Mississippi river being the boundary between this state and Iowa, the authorities of this state had no greater right to grant a franchise to operate and be enjoyed beyond our boundary than Iowa has to grant one to be enjoyed beyond her boundary. If the appellee, in using his franchise, injures the appellant, or trespasses upon his landing, he has a remedy by action at the common law, but he cannot be the judge in his own case, declare a forfeiture, and seize and take into his possession the thing he adjudges to be forfeited. There is an important fact to be established before a forfeiture can be declared, and that is, has the pretended ferry authority — is it a legally established ferry? This question the owner of the rival ferry cannot determine for himself; it must go to the court. He cannot be his own judge, and at the same time the executioner. This is supposed to be a government of law, and all must await its sometimes tardy movements.

The verdict passed in this case for the plaintiff, and we think correctly, and affirm the judgment upon the verdict.

The appellant has no ground to stand upon, as shown by this record.

Judgment affirmed.

[100*] *HENRY VOGLE et al. vs. ADAM RIPPER.

CONTRACTS: *Effect of an alteration of a written instrument.*[1]

The effect of an alteration in a written instrument depends upon its nature, the person by whom and the intention with which it was made. If neither the rights nor interests, duties nor obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial.

SAME: *Effect of a fraudulent alteration.*

A material alteration of an instrument fraudulently made by its holder justly deprives the wrongdoer of all rights by virtue of it. The identity of the instrument is thereby destroyed; and a party who voluntarily destroys the evidence of a debt agreed upon by the parties, ought not to be allowed to supply its place by other evidence.

SAME: *Same.*

Thus, where a mortgagee has released or discharged the mortgage debt by a fraudulent alteration or destruction of the written evidence of it, he ought not to be permitted to sustain a suit for its recovery by bill to foreclose the mortgage.[2]

SAME: *Effect of an alteration not fraudulent.*

But where the alteration was not fraudulent, although the identity of the instrument may be destroyed, it will not cancel a debt of which the instrument was merely evidence.[3]

SAME: *Same.*

Where, on a bill to foreclose a mortgage, the bill alleged that the notes secured thereby were altered after their execution with the assent of the maker (being the mortgagor), and the grantee of the equity of redemption, so as to bear interest at ten per cent. instead of six per cent., as originally executed; and the answers denied that the alterations were made by consent, but did not aver that they were fraudulently made, although they averred that the identity of the notes was destroyed: *Held*, that the intention with which the alterations were

[1] As to the effect of an alteration upon an innocent party, see Rose Clare Lead Co. *v.* Madden, 54 Ill., 260; Seibel *v.* Vaughn, 69 id., 257; and Harvey *v.* Smith, 55 id., 224; erasure of part written with pencil.

[2] See Elliott *v.* Blair, 47 Ill., 342, recovery on the original consideration.

[3] See Elliott *v.* Blair, *supra.*

made was a material fact, but not being put in issue by the answers, the evidence in regard to it could not be considered; and the decree of the court below for the sum which would have been due upon the notes, if they had not been altered, the interest being computed at six per cent., was affirmed.

SAME: *Effect of an alteration by a stranger.*

An unauthorized alteration by a stranger ought not to destroy the rights of innocent parties, and it seems that such an alteration will not cancel a debt of which the instrument was merely the evidence.

CHANCERY PLEADING: *Statement of conclusions of fact in answer; pleadings and evidence.*

The complainant has a right to have notice upon the record, in a precise and unambiguous manner, of the conclusions of fact intended to be drawn from allegations in an answer. The defendant is not required to state conclusions of law which he would deduce from the facts set forth; but if he states in his answer certain facts as evidence of a particular case which he represents to be the consequence of such facts, and on them rests his defense, he is not afterwards at liberty to use the same facts for the purpose of establishing a different defense from that to which he has drawn the complainant's attention by his answer; and evidence in support of such different defense will not be considered by the court. (See the next proposition *supra.*)

ERROR: *Admission of improper evidence, when not.*

A defendant can not complain of the admission of evidence alleged to be inadmissible in support of certain allegations of a bill, which are not sustained and are decreed against by the court.

ERROR to Circuit Court of *Peoria* County.

Foreclosure bill filed by defendant in error against plaintiff in error, to which the defense was set up that the mortgage in question had been discharged by reason of an alteration of the notes (to secure which it had been executed), after their execution, by changing the rate of interest therein stipulated for, from six to ten per cent.

The notes and mortgage in question were executed by Vogle to one Stanberry. The mortgaged premises were afterwards sold by Vogle to Heisel subject to the mortgage, and the alteration in question was alleged in the bill to have been made subsequently by agreement between Vogle, Heisel and complainant. The alteration appears to have been made by Stanberry, and was made to induce complainant to take the notes.

The decree below was for complainant for the amount due upon the notes with interest computed at six per cent., it being considered that it was not shown by the evidence that Heisel was a party to or consented to the alteration.

H. M. Wead, for plaintiffs in error. *C. A. Roberts* and *R. W. Ireland*, for defendant in error.

[106*] *Beckwith, J. The effect of an alteration in a written instrument depends upon its nature, the person by whom, and the intention with which it was made. If neither the rights or interests, duties or obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial. It has been considered that even an immaterial alteration, if fraudulently made, would annul the instrument (2 Pars. on Notes and Bills 572), but this opinion has not been uniformly adopted; and it has been held that the motive cannot be inquired into unless the act itself materially affects the rights of parties. *Moye v. Herndon*, 30 Miss., 110, An alteration by a stranger ought not to destroy the rights of innocent parties. 2 Pars. on Notes and Bills, 574. There is a conflict of opinion regarding the existence of a right of action on an instrument which has been altered by a stranger; but whatever may be considered as the correct rule in that regard, we are unable to perceive any good reason why such an alteration should cancel a debt, of which the instrument was merely evidence. *Davidson v. Cooper*, 11 M. & W., 778. It ought to be regarded as a spoliation. A material alteration of an instrument, fraudulently made by its holder, [107*] justly deprives the wrongdoer of all *rights by virtue of it. The identity of the instrument is thereby destroyed, and courts will not assist persons who have been guilty of a fraud to carry out the transaction wherein it was perpetrated. A party who voluntarily and fraudulently destroys the evidence of a debt agreed upon by the parties ought not be allowed to supply its place by other evidence. 2 Pars. on Notes and Bills, 572; *Waring v. Smith*, 2 Barb. Ch., 135.

In a court of equity a mortgage is regarded as an incident

of the debt, and where a mortgagee has released or discharged the debt by a fraudulent alteration or destruction of the written evidence of it, he ought not to be permitted to sustain a suit for its recovery; but where the alteration was not fraudulent, although the identity of the instrument may be destroyed, we think it should not cancel a debt, of which the instrument was merely evidence. If there was no attempt to defraud, there is no reason why a court should not assist the creditor as far as it can consistently.

In the case under consideration, it was urged in argument that the alterations were fraudulently made. The bill alleges that the notes were altered with the assent of Vogle and Heisel, so as to bear interest at the rate of *ten* per cent. instead of *six* per cent., as they were originally written. The answers deny that the alterations were made by consent, but do not aver that they were fraudulently made. While the answers aver that the identity of the notes is destroyed, they do not aver that it was fraudulently done. The complainant has a right to have notice upon the record, in a precise and unambiguous manner, of the conclusions of fact intended to be drawn from allegations in an answer. The defendant is not required to state conclusions of law which he would deduce from the facts set forth; but if he states in his answer certain facts as evidence of a particular case which he represents to be the consequence of such facts, and on them rests his defense, he is not afterwards at liberty to use the same facts for the purpose of establishing a different defense from that to which he has drawn the complainant's attention by his answer. 2 Dan. Ch. Pr., 815; *Bennett v. *Neale*, Wight., [108*] 324. We think the intention with which the alterations were made is a material fact. The character of the act and the effect of it depend upon the intention with which it was done. As the intention is not put in issue by the answer, it would be improper for us to consider the evidence in regard to it.

The decree of the court below was for the sum which would have been due upon the notes if they had not been altered.

and the testimony of Stanberry[1] relating to the alterations merely, and the intention with which they were made, was immaterial, and was in no way relied upon in the conclusion to which the court arrived.

The complainant failed to sustain the allegations of his bill by which he sought a decree for a greater sum, and the defendant cannot complain that the evidence adduced in support of such allegations was inadmissible. The decree was rendered for the sum due, and it is affirmed.

Decree affirmed.

THE CHICAGO AND ROCK ISLAND RAILROAD COMPANY vs. JOHN S. HUTCHINS.

NEW TRIAL: *Verdict against the evidence.*

Although the evidence in support of a verdict may not be entirely free from doubt, still if the verdict is not clearly against the weight of the evidence, it will not be disturbed.[2]

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[1] It was insisted by plaintiffs in error that the deposition of Stanberry was improperly admitted, he being, as it was claimed, incompetent on the ground of interest, by reason of his having indorsed the notes.

[2] Where the trial of a question of fact is by the court without the intervention of a jury, its finding will be affirmed or reversed by the same rules as if tried by a jury. Ambs *v.* Honore, 24 Ill., 122; Toledo, W. & W. R'y Co. *v.* Elliott, 76 Ill., 67.

To the point that the finding must be clearly against the weight of the evidence, in order to warrant its being disturbed, see Allen *v.* Smith, 3 Scam., 97; Ellis *v.* Locke, 2 Gilm., 459; Dawson *v.* Robbins, 5 id., 72; Evans *v.* Fisher, id., 572; Welden *v.* Francis, 12 Ill., 460; Mann *v.* Russell, 11 id., 586; White *v.* Clayes, 32 id., 325; Wallace *v.* Wren, id., 146; Ill. Cent. R. R. Co. *v.* Cowles, id., 116; Hiner *v.* The People, *post*, 297; Henry *v.* Eddy, *post*, 508; Chicago & R. I. R. R. Co. *v.* Crandall, 41 id., 234; Town of Vinegar Hill *v.* Busson, 42 id., 45; Toledo, P. & W. R'y Co. *v.* McClannon, 41 id., 234; Hope Ins. Co. *v.* Lonergan, 48 id., 49; Davis *v.* Hoeppner, 44 id., 306; Sawyer *v.* Daniels, 48 id., 269; Palmer *v.* Weir, 52 id., 341; Chillicothe Ferry, R. & B. Co. *v.* Jameson, 48 id., 281; Sheeran *v.* Chicago & M. R'y Co., 48 id., 523; Lawrence *v.* Hagerman, 56 id., 68; City of Peru *v.* French, 55 id., 317; Kuhner *v.* Blitz, 56 id., 171; Toledo, P. & W. R'y Co. *v.* Firth, 60 id., 451; Young *v.* Schorling, 60 id., 148; Walker *v.* Martin,

The Chicago and Rock Island R. R. Co. vs. Hutchins.

CUSTOM: *Enters into contract.*[1]

It being the universal custom in this country for the engine driver to sound the whistle or ring the bell at all places required by law, that duty must, as it seems, be understood to enter into and form a part of his contract when employed by a railroad company.

AGENCY: *Liability of agent to principal for negligence.*

It being the duty of an engine driver to sound the whistle or ring the bell at all places required by law, by a neglect to perform such duty he becomes liable over to his employers when they have been compelled to respond in damages for his non-performance of such duty.

FORMER SUIT FOR SAME CAUSE OF ACTION: *When a bar to action against agent.*[2]

Where an action is brought against a railroad company to recover damages for the negligence of an engine driver on its road in omitting to sound the whistle or ring the bell at a place required by law, a verdict finding no negligence will, as it seems, be a bar to a recovery against the engine driver for the same cause of action.

WITNESSES: *Interest.*[3]

In an action against a railroad company to recover damages resulting from the neglect of an engine driver to sound the whistle or ring the bell at a place required by law, the engine driver is incompetent to testify on behalf of defendant as to whether the whistle was sounded or bell rung at the place in question.

APPEAL from Circuit Court of *Henry* County.

Case by appellee against appellant, for running against and

59 id., 348; Illinois Cent. R. R. Co. *v.* Dunning, id., 192; Toledo, P. & W. R'y Co. *v.* Hobble, 61 id., 388; Keller *v.* Rossbach, 61 id., 342; Aurora Fire Ins. Co. *v.* Eddy 55 id., 213; Reynolds *v.* Lambert, 69 id., 495; Summers *v.* Stark, 76 id., 208; Edgman *v.* Ashelby, 76 id., 161; Toledo, W. & W. R'y Co. *v.* Moore, 77 id., 217; Chapman *v.* Burt, 77 id., 337; Plummer *v.* Rigdon, 78 id., 222; Miller *v.* Balthasser, 78 id., 302; Chicago & N. W. R'y Co. *v.* Ryan, 70 id., 211; Reynolds *v.* Palmer, id., 288; Simons *v.* Waldron, id., 281; Wiggins Ferry Co. *v.* Higgins, 72 id., 517; Gilbert *v.* Bone, 79 id., 341, suit on a penal statute.

[1] See Fay *v.* Strawn, 32 Ill., 295; Deshler *v.* Beers, id., 368; Dixon *v.* Dunham, 14 id., 324; Crawford *v.* Clark, 15 id., 561; Home Ins. Co. *v.* Favorite, 46 id., 263; Lonergan *v.* Courtney, 75 id., 580; Cahn *v.* Mich. Cent. R. R. Co., 71 id., 96; Ind., B. & W. R'y Co. *v.* Murray, 72 id., 128; Doane *v.* Dunham, 79 id., 131; Wilson *v.* Bauman, 80 id., 493; U. S. Life Ins. Co. *v.* Advance Co., 80 id., 549, usage affecting agents' authority.

[2] See Goodrich *v.* Hanson, 33 Ill., 499.

[3] No longer a disqualification, but only goes to the credibility of the witness. Rev. Stat., 1874, 488.

killing plaintiff's mare and colt with a locomotive on defendant's road.

The case is sufficiently stated in the opinion of the court.

Glover, Cook & Campbell, for appellant. *Carpenter & Dunham*, for appellee.

[110*] *WALKER, C. J. Appellee claimed to recover on the ground of negligence by the company. First, in not keeping in repair the fence separating their road from his pasture, in consequence of which the animals got on the road and were killed; and secondly, in failing to ring a bell or sound a whistle, as required by law, at the road crossing at which the animals were killed. The questions were fairly presented to the jury, and they have found that there was negligence on the part of the company. The evidence was sufficient to warrant the finding, and although it may not have been entirely free from doubt, still the verdict is not clearly against the weight of evidence, and unless it was, the verdict will not be disturbed.

A reversal is urged upon the ground that the engine driver was not permitted to testify as to whether the bell [111*] was rung at *the road crossing where the animals were found. If his neglect of duty caused the injury, and the company should be held liable, he would be liable over to them. His engagement implies the discharge of every duty pertaining to the place. The engine and all of its parts are completely under his control, and the fireman is subject to his orders. This is necessarily so, as otherwise the fireman could regulate the speed, and not the driver. It appears to be customary for the engine driver to ring the bell or sound the whistle at all road crossings, and to frighten the stock from the track when the train is in motion. It is true that he may require this to be done by the fireman, but still it is under the direction of the driver. There can hardly be a doubt that, in the absence of all agreement or instructions, it would be the duty of the engine driver to sound the whistle or ring the bell at all places required by the law. Such is believed to be

the universal custom in this country, and it must be understood to enter into and form a part of his contract when employed by the company.

Such being his duty, by a neglect to perform it on his part, he becomes liable over to his employers when they have been compelled to respond in damages for his nonperformance of duty. This being so, he has a direct interest in preventing a recovery against the company. *Galena & Chicago Union R. R. Co. v. Welch*, 24 Ill., 31. Nor can we see that his interest is balanced. If the owner of the property is defeated in a recovery, not only the company, but he, escapes all liability. And it does not matter that the owner may elect to sue either the driver or company, because when a jury have found in an action against the company that there was no negligence, it is a bar to a recovery against the agent. There was, therefore, no error in not permitting the engine driver to testify on the question whether the bell was rung.

Upon a careful examination of the instructions, we perceive no error either in giving, modifying or refusing them. They appear to have stated the law correctly as it was applicable to the evidence before the jury. They were not calculated to, nor do we think they misled the jury. No error is perceived *in this record, and the judgment of the [112*] court below must be affirmed.

Judgment affirmed.

PERSONS C. GILBERT vs. D. W. GUPTILL, Administrator of DANIEL W. PINNEO, deceased.

STATUTE OF LIMITATIONS: *In equity.*

Where the statute of limitations would be a bar in a court of law, it seems that it would also be a bar under the same circumstances in a court of equity. The statute cannot be avoided by a change of forum. Where the jurisdiction is concurrent, the statute also applies to the court of equity.[1]

[1] See Manning *v.* Warren, 17 Ill., 267; Harris *v.* Mills, 28 id., 44.

SAME: *Citation of guardian to account, not within the statute.*

A citation of a guardian to account before the probate court is not a suit within the meaning of the statute of limitations, and is not barred by the lapse of five years, after the ward has arrived at age, before the commencement of the proceedings. It is a means of ascertaining a delinquency, so that suit may be brought for the amount of the delinquency, so adjudged by the probate court, against the obligors in the bond; and the statute cannot be pleaded in bar to such proceedings so long as the bond has force and vitality.

SAME: *Same; where guardian submits to an accounting, he cannot afterwards raise the question.*

Even if the statute of limitations were a good plea to such a citation, still where the guardian submits to an accounting, and his account is disapproved and he ordered to make another, which he does, he cannot insist upon the statute in such second account made in pursuance of such order, inasmuch as his rendering an account shows that he still occupies the position of a trustee towards his beneficiary, and while that relation continues, the statute cannot be interposed.

JUDGMENTS. *Stating an account is not.*

The finding of a certain sum due upon the statement by the court of a guardian's account, and directing him to pay it over to the administrator of the ward, although it fixes the amount of the recovery upon the guardian's bond and is *res adjudicata* as to the amount, is not the entry of a judgment against the guardian.

GUARDIAN:[1] *Liable for money loaned without security, etc.*

Where a guardian loans his ward's money without security and without the approval of the court, if the money is thereby lost, he will be chargeable therefor with interest.

GUARDIAN'S ACCOUNTS: *Where the office has expired; guardian may be interrogated concerning.*

A guardian voluntarily rendering an account and submitting himself to the jurisdiction of the probate court may be interrogated by the court as to its correctness, and upon his guardianship generally, and cannot thereafter object that his office has expired, and that the court has no jurisdiction by citation to compel a report.

SAME: *Guardian compelled to testify concerning.*

The proceedings upon a citation of a guardian to account before the probate court may be likened to a bill for a discovery against the guardian, and it seems he may be compelled to testify concerning the estate of his ward.

INTEREST: *On money in guardian's hands after his ward's majority.*

Where a ward requested his guardian to have his money ready for him

[1] See Bond *v.* Lockwood, 33 Ill., 212.

on his majority, but it was not demanded for some years thereafter, it was *held*, that as after the ward's majority the guardian would have no right to loan the money or use it in any manner, but be bound to have it on hand to pay over on demand, he should not be charged with interest thereon after the day his ward arrived at full age till such demand, unless it could be shown he made profits out of the money.

APPEAL from the Common Pleas of the City of *Elgin*.

Appeal from the statement in the court below of an account of the appellant, as guardian of Daniel H. Pinneo, deceased, wherein the amount found due from him, as such guardian was $1,443.76.

Administration on the estate of said Daniel H. Pinneo was, on April 30, 1862, granted to appellee by the county court of Kane county, on the presumption of his death arising from his absence and no intelligence being had of him for more than seven years; and on June 9, 1862, in pursuance of the request of appellee, appellant filed his first report or account of his ward's estate, verified by his oath as containing a just and true account of moneys received and expended, etc., and dated May 27, 1862, wherein after certain charges against himself, he credits himself, among other items, with the sum of $698.59 loaned on the 6th of January, 1855, to E. Tefft and J. I. Clark & Co., concerning which said report contained the following statement: "The above amount of $698.59, included in a judgment in the Kane circuit court, January 27, 1858, in the case of *Persons C. Gilbert v. Erastus Tefft, Jason S. Clark and Demarias Clark*, not collectable at present, $698.59, costs paid in obtaining said judgment, clerk's and sheriff's fees, $12.80; attorney's fees, $25; in all $37.50."

Said account having been disapproved by the court and the making of another ordered, on July 19, 1862, a second report was filed by appellant, verified by oath like the former, wherein he stated, among other things, that said Tefft and Clark & Co. were, at the time said loan was made, responsible residents of said county, but that by reason of their subsequent insolvency the amount so loaned and for which judgment had been re-

covered by appellant could not be collected by appellant. This report contained the following protest: "And the undersigned, while submitting the above report in obedience to the order of this court, would protest against the right or authorty of this court to compel this report to be made, or to enforce the payment of any sums received by the undersigned as guardian, as aforesaid, of the said Daniel, or to his representatives, for the reasons: 1st. The undersigned is not now, nor has been for years, guardian of the said Daniel; and, 2d. More than six years have elapsed since the said Daniel became of age; and for this reason, the said Daniel or his representatives are barred from claiming an account, or enforcing the same."

Upon the disapproval of this account the court stated appellant's account, and ordered him to pay over to appellee the amount found due, $1,132.12; upon appeal from which the account was restated by the court of common pleas, as aforesaid, from which an appeal to this court was taken.

The questions raised upon this appeal are sufficiently stated, in the opinion of the court.

Plato & Smith, for appellant. *Sylvanus Wilcox*, for appellee.

[135*] *Breese, J. The appellant, on his assignment of error, makes these points: 1. That appellant was not liable to render an account in this matter, for the reason that more than five years had elapsed after his ward arrived at age, before the commencement of these proceedings. 2. If the statute was no bar to the proceedings, yet all the court could have done was to state an account, having no power to render a judgment or enforce the payment of the same. 3. That if this power existed, the appellant having loaned the money for the benefit of his ward, he cannot be charged with the loss of the money, he having exercised due care and diligence. 4. That appellant was not a competent witness in this proceeding. 5. If any liability was established against appel-
[136*] lant, the court fixed too large a sum. *6. The county

court had no jurisdiction to compel, by citation, a report to be made by appellant, he being no longer an officer of that court.

Upon the first point, appellant cites several cases supposed to be decisive of this.

It is admitted, if the statute of limitations would be a bar in a court of law, it would also be a bar, under the same circumstances, in a court of equity. The statute cannot be avoided by a change of forum. And it is also admitted that where the jurisdiction is concurrent, the statute also applies to the court of equity. These are general principles which no one will dispute.

The case of *Bertine v. Varian*, 2 Edw. Ch., 343, is also referred to as a case in point. That case certainly decides that a guardian of an infant can interpose the statute of limitations to a bill filed against him, or his administrator, for an account. It decides that the remedy was complete at law when the wards arrived at full age, and no sufficient reason was shown why they did not resort to the remedy in apt time. In that case, from the time one of the wards came of age to the death of one of the guardians, eleven years had elapsed, and in the case of the other complainant, about eight years, during all which time no steps were taken to call the guardian to an account; and after his death about nine years more supposed to elapse before that suit was instituted against his representatives, and no reason given for the delay. That the presumption arises from this lapse of time, that the claim had been satisfied and the vouchers lost. The vice-chancellor, however, says, if the delay could have been satisfactorily accounted for by the production of sufficient facts, such facts would prevent the operation of the statute in the view of a court of equity.

The appellant's counsel also refers to 37 Penn., 123, without complying with the rule of this court, by giving the names of the parties in the case. We have examined that book at the page indicated, and find no case there bearing on this point, certainly none which appellant's counsel have given in their brief as a quotation from it.

[137*] *He also cites 14 N. H., 401, without giving the names of the parties. We find at that page the case of *Kittredge, Adm'r, v. Betton, Ex'rx*, but do not find the principle there asserted in the terms in which it appears in the appellant's brief. The case merely decides that a settlement out of court, between a guardian and his former ward, who has come of age, and a release to the guardian, is not a compliance with the condition of his bond, which requires the guardian to render an account, when required, in the probate court, and that the administrator of a ward, when in the court of probate, has the same privilege as the guardian, who, on being cited to the probate court, relies on such a settlement, he must bring into court the settled account, that the ward may there surcharge and falsify it.

Notwithstanding the case of *Kane v. Bloodgood*, 7 Johns. Ch., 91, and the other cases cited and based upon it, Hill, in his elaborate work on trustees, after an examination of all the cases decided in England, and which are cited and commented on in *Kane v. Bloodgood*, says: "On the whole it must be admitted that the effect of the statute of limitations, as applied to the estates of trustees, is left in a very unsatisfactory state by the authorities, and it is extremely difficult to gather from them any very definite rules of general application on the points." Hill Trust., 268.

The answer to the authorities and argument of appellant is this, that the citation to account before the probate court is not in the nature of the action of account at law or in equity, and which would be barred in five years. It is merely a mode provided to ascertain the sum for which a guardian is chargeable in the probate court, and is the proper mode, in most cases, to lay a foundation for proceedings against the sureties in the guardian's bond, and in which no judgment is rendered. This appears, from the case cited by appellant, from 14 N. H., 401. And what is the statute upon the subject? The sixth section provides that courts of probate shall have power, with or without previous complaint, by an order duly made and served, to oblige all guardians of minors from time to

time, to render their respective accounts, upon oath, *touching their guardianship, to said courts for ad- [138*] justment, and shall have power to compel them to give supplemental security, etc., and to remove them.

What is the condition of the bond a guardian is required to give? It is that he will faithfully discharge the office and trust of guardian, according to law; that he will render a fair and just account of his guardianship to the court appointing him, from time to time, as he shall be required by the court, and comply with all the orders of the court lawfully made relating to the goods, chattels and moneys of the minor, and render and pay to the minor all moneys, goods and chattels, title-papers and effects which may come to his hands as guardian. This bond is not to be void on the first recovery, but may be put in suit from time to time against one or all the obligors. This bond is a continuing surety until the penalty is exhausted, and the settlement with the court of probate, by the guardian, made before or after the ward arrives at full age, fixes the amount of damages to be recovered under the bond. This bond, by section one of the limitation act of 1849 (Scates' Comp., 752) remains in force for the term of sixteen years as such security, and can be sued on from time to time within that period. Therefore, we say, as the accounting before the probate court is not a suit within the meaning of the statute, but is the means of ascertaining a delinquency, so that suit may be brought for the amount of the delinquency so adjudged by the probate court against the obligors in the bond, the statute of limitation was no bar to the proceedings before the probate court, and cannot be pleaded in bar so long as the bond has force and validity. It will not be denied that the administrators of one who has been under guardianship can bring all actions resting in contract which the ward himself might have brought, provided such actions are brought within the time limited by law. This being so, it cannot be denied, such administrator has the right to the securities given by the guardian for the protection of his ward; and having this right, it must follow that he has the right to use

[139*] the means the law *gives to ascertain for what amount, on accounting before the probate court, the guardian and his sureties are responsible under the bond, and to this inquiry there is no limit but sixteen years.

The case cited from Edwards' Chancery Reports is the only case we have been able to find where the point was directly determined that a guardian, or rather his personal representative, could interpose the statute of limitations. And in that case, it seems to be placed rather on the ground of staleness of demand from lapse of time.

The facts in this case are different greatly from the facts in that, and are peculiar. The ward's unaccountable disappearance, about the very day he became of age, the delay necessarily occurring, so that the legal presumption of his death should obtain, by receiving no intelligence of him for seven years. As he was of age on the 2d of January, 1854, and the last information of his being in life was on the 30th of December preceding, it is not impossible that he died before he came of age. These facts will account for any delay that has occurred, if any delay can be charged in the case.

But there is something more in the case. If the statute of limitations was a good plea, did not the appellee show enough by the admissions of appellant in the several accounts he rendered to the court, especially the first one, to take the case out of the operation of the statute in a court of equity? We think he did. At the first investigation of his accounts, he did not set up this defense, but submitted to an accounting, and probably never would have set up the statute, could he have received a credit for the judgment against Tefft and Clark. But be this as it may, his rendering an account shows that he still occupied the position of a trustee towards his beneficiary, and while that relation subsisted, the staute could not be interposed. Had he denied this relation, then it might be said his attitude was hostile and adverse to his *cestui que trust.* It is true, in his protest, he declared he had not been guardian for some years, which was not the fact, as his duties

as guardian had not ceased until he had fully accounted and paid over the balance against him.

Upon the next point we have to remark, that it does [140] not appear the court below entered up any judgment against the appellant, but found a certain sum due, and directed him to pay it over to the administrator. This finding fixes the amount of the recovery under the bond; it is *res judicata* as to the amount.

The third point made by appellant has no evidence to rest upon. All the testimony shows a flagrant disregard of the interests of his ward in loaning this money. The eighth section of the statute respecting guardians and wards provides, that guardians shall put to interest the moneys of their wards upon mortgage security to be approved by the court, the letting to be for one year, and at the end of each year to add the interest to and make it a part of the principal. This he did not do, but suffered nearly all the money to remain from year to year in the hands of his brother-in-law, without any security and without the approval of the court, and on which the interest was not compounded annually, nor any gains made thereon for his ward. This was a great dereliction of duty, and the loss of the money is clearly chargeable to his own negligence and disregard of the statute.

Upon the point that appellant should not have been compelled to testify, we answer, that he testified voluntarily. As the proceedings before the probate court are likened to proceedings in chancery (*Moore v. Rogers*, 19 Ill., 347; *Dixon v. Buell*, 21 id., 203), this may be likened to a bill for a discovery against the guardian, wherein it is necessary to sift his conscience, and to get at facts of which he alone could have any knowledge, as he had never reported any of his actings and doings, as guardian, to the court. But it is too late for him now to make the objection. He testified voluntarily, and his evidence is recorded, and by that he must be judged. Though he was a party interested, that was waived by the appellee, when he consented that his evidence should be heard.

Upon the last point made by appellant, it is sufficient to

say, if appellant was not an officer of the court, at the time he made his report, it can make no difference; he was be-
[141*] fore the *court voluntarily, to render his account, on oath, of his guardianship, which he had covenanted to do by his bond. He rendered his account, and made oath that it was just and true, and the court had a right to interrogate him as to its correctness, and upon his guardianship generally. He voluntarily submitted to the jurisdiction, and it is now too late to raise any question about it.

Another point remains to be considered, and it is as to the amount of the recovery. It will be seen by the letter of the ward, of December 30, 1853, to appellant, written from Wheeling, he informed appellant he should return home in a few weeks, and desired appellant to have his money ready for him, as he would then be of age. This request, it was the duty of appellant to be ready to meet, as his ward would then have the right to demand his money. After that event, appellant would have had no right to loan the money, or use it in any manner, but be bound to have it on hand to pay over on demand; consequently, appellant should not be charged with interest after the day his ward arrived at full age, unless it can be shown he made profits out of the money. The appellant should be charged with the moneys he received belonging to his ward, and compound interest thereon, at six per cent. from the day he received it, until his ward became of age, and interest on the amount, from the day of demand by the administrator of the ward, to the time of entering the final order. The recovery below exceeds the amount these data would establish.

The order of the court below is reversed, and the cause remanded to the circuit court, with directions to state an account as follows: Charge appellant with the moneys he received, and calculate interest on the amount, at six per cent., compounded annually, to the day the ward became of age, and credit him with the expenses paid by him, amounting to sixty-two $\frac{46}{100}$ dollars, and his commissions at six per cent. on the whole amount received, and then charge him with interest at

six per cent. on the balance, to be calculated from the day (ninth of June, 1862,) appellee demanded an account, to the day of entering the final order. No account will be taken of *the money collected by Daniel in Ohio, one- [142*] half of which, being two hundred dollars, he transmitted to appellant for his brother John, to whom it belonged, the other half Daniel retained, as it appears from all the circumstances, to his own use, which he had a right to do

Judgment reversed.

Nathaniel Heckard vs. Edward Sayre.

Vendor and Purchaser: *Time of the essence of the contract.*[1]

The parties to a contract for the sale of land may make time of the essence of the contract; and a court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident or mistake has intervened.

Same: *Same.*

Where, therefore, a tender of the amount due on a contract for the sale of land, wherein time was made of the essence of the contract, was not made by the vendee till six days after it fell due, and the only excuse set up for the vendee's neglect to make the payment at the time required, was that he was then engaged in the dischage of his official duties as clerk of the circuit court: *Held*, on a bill filed by the vendee for a specific performance, that the excuse was insufficient.

Same: *Attempt to collect purchase money, a waiver of a forfeiture.*

Should the vendor in such case attempt to compel the payment of the note given by the vendee for the purchase money, an equitable right to a conveyance of the land would then exist which, upon a proper application would be enforced.

Error to Circuit Court of *Peoria* County.

The case is sufficiently stated in the opinion of the court.

McCulloch & Taggart, for plaintiff in error. *W. C. Goudy*, for defendant in error.

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[1] See Milnor v. Willard, *ante*, 38.

[148*] *Beckwith, J. This is a suit in equity to enforce the specific performance of a contract for the sale of a tract of land in Fulton county.

On the 18th day of September, 1855, the plaintiff in error bargained with the defendant in error to sell him the land for the sum of $900. One hundred and five 89-100 dollars [149*] were then *paid, and two notes were given for the residue; one for $494.11 payable on or before October 25, 1857, and the other for $300, payable on or before September 1, 1858.

The contract between the parties provided that the above notes should be paid at maturity; that the time stipulated for their payment should be regarded as of the essence of the contract; and that the nonpayment of either of the notes, when they should become due should be considered as an avoidance of the vendor's obligation, and as an absolute forfeiture of all payments previously made. The note maturing first was paid at maturity, and a tender of the amount due upon the other note was made on the 7th day of September, 1858, six days after it fell due.

The bill alleges a waiver by the vendor of the prompt performance of the agreement; and sets up as an excuse for the vendee's neglect to make the last payment at the time required, that he was engaged in the discharge of his official duties as clerk of the circuit court of Fulton county.

There is no evidence of any waiver by the vendor of the stipulation in regard to time, and we think the excuse alleged is entirely insufficient. The term of the court at which the defendant in error was required to attend commenced on the 6th day of July, 1858, and he might have employed some one to transact his business with the plaintiff in error, if it was not convenient to attend to it in person. Such an excuse, if allowed, would exempt the clerks of many courts in this state from ever discharging their obligations.

From the allegations of the bill, it appears that the complainant did not have the money to make the last payment at the time it became due; and stipulations like the one in the

contract under consideration would be of little value if they were to be enforced only in cases where parties making them had the money with which they might be discharged. No rule is more firmly settled than that parties may make time of the essence of a contract. In this case the parties have so made it, in plain and unambiguous language.

At law the defendant in error has no remedy for a breach of the agreement by reason of his own nonperformance. He *was not hindered or prevented in the discharge [150*] of his obligations by any fraud, accident or mistake; and under such circumstances, equity must follow the law. A court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident or mistake has intervened. To relieve from the effect of such stipulations, except on the grounds named, would practically deny the right of parties to make them. Such relief would result in great injustice to vendors. Usually the price of lands in this country is fixed with reference to prompt payment; and where they are an article of commerce, it is often of the last importance to a vendor to receive his money promptly. We have all known men of affluence reduced to penury by neglect in making such payments as they became due. A vendor may require the payments to be made promptly to enable him to meet his own engagements; and for that purpose a stipulation may be inserted in the contract that time shall be of its essence. If courts were to allow a vendee to neglect to make his payments at the stipulated times, where he is not hindered or prevented from so doing by fraud, accident or mistake, the consequences of his negligence would be visited upon his vendor. Justice does not require relief from the result of one's own negligence. Courts of equity in such cases refuse to interfere; and leave the parties to their remedies at law, if any they have, for the reason that there is no equity requiring such an interposition.

It was urged in argument that the plaintiff in error might compel the payment of the note of the defendant in error, but

if he should do so, an equitable right to a conveyance of the land would then exist which, upon proper application, would be enforced. Equity would not allow the plaintiff in error to collect the residue of the purchase money and hold the land, but until he attempts its collection, no such equity arises.

The decree of the court below is reversed, and the cause remanded.

Decree reversed.

[151*] *Colin Campbell vs. Robert Stewart.

Partnership: *Firm money deposited in name of individual partner.*

Where the money of a firm is, as a matter of convenience and by agreement of the parties, deposited in bank in the name and on the account of one of the partners, but is not under the exclusive control of the partner in whose name it is deposited, the other partner procuring checks at all times when desired for use in the business of the firm; and such money is, for convenience, to indicate in which partner's hands the funds are, charged upon the firm books to the partner in whose name it is deposited; in case of a loss of the funds by the failure of the bank, such loss will be chargeable to the firm and not to the partner in whose name deposited.

Error to Superior Court of *Chicago.*

Bill filed by plaintiff in error against defendant in error, for an account of the partnership transactions between the parties under the style R. Stewart & Company.

The case is sufficiently stated in the opinion of the court.

Hervey & Galt, for plaintiff in error. *Arrington & Dent*, for defendant in error.

[156*] *Walker, C. J. This controversy grows out of a loss of money by the failure of E. I. Tinkham and Co.'s bank. Plaintiff in error contends that the moneys deposited in the bank belonged to defendant *in [157*] error, whilst he contends, that it was the property of R. Stewart & Co. It appears that the parties to this bill were

partners, and by mutual agreement, the funds of the firm were deposited with E. I. Tinkham & Co., in the name and on the account of defendant in error. He already having an account with these bankers, it was supposed to be more convenient and preferable to opening an account with them in the name of the firm. It appears, that at one time the firm had thus deposited as much as $5,109.33. But afterwards defendant in error drew out on his check, $2,025, which was applied to the payment of a note given by him, to Meadowcraft, and other sums, as he alleges to pay debts of the firm, leaving still on deposit $2,114 belonging to the firm.

Their book-keeper testifies, that defendant in error advanced much the largest portion of the capital. That the business of the firm had ceased and was closed, except a few small articles of joint property remained. That plaintiff in error was entitled to $935.45 as his share of the money on deposit, and the remainder belonged to defendant in error.

It is insisted that inasmuch as the deposit account of the firm moneys was kept in the name of defendant in error, that it amounted to an appropriation of the whole sum to his use, and that he must sustain the loss, and account to plaintiff in error for his portion of the funds. The evidence shows that it was so kept as a matter of convenience by agreement of the parties. And it appears that the funds were not exclusively under the control of defendant in error, as plaintiff in error procured checks at all times when he desired, and thus drew out and used funds in the business of the firm. And after bank paper began to depreciate, he was on several occasions consulted as to what he preferred should be done with the funds, when he uniformly gave it as his opinion, that they should be permitted to remain in E. I. Tinkham & Co.'s bank, where they were deposited. He also, in speaking of the business of the firm after the bank failed, stated that it had lost on depreciated bank paper. And the record shows no other loss, and that it refers to this loss, seems to be clear.

It was likewise insisted, that the charge of the [158] whole $5,109.33 to defendant in error, appearing upon

the firm books, is evidence that he had appropriated the whole fund to his own use. It appears that this entry was made by the book-keeper for convenience, and as all parties, after it was made, understood the money on deposit to belong to the firm, we would not be warranted in the conclusion that it was appropriated to the use of defendant in error. It was an entry of the book-keeper made simply to indicate in which partner's hands the funds were.

Although the defendant in error drew out the larger portion of this money, it fails to appear what portion was for his individual use. One note of five hundred dollars was given in the firm name to Meadowcraft, and was paid out of these funds. Again, it does not appear how much capital defendant in error was to put into the firm. It appears that plaintiff in error put in only seven hundred dollars, and we are not informed whether any portion of the sum put in by defendant in error was loaned to the firm. It appears, however, that a portion of the funds was taken from his wood and coal business, which would seem to indicate that it must have been loaned; and if so, he had the right to withdraw it from the firm when he chose. If the firm was in debt, he had the right to pay the debts out of the fund belonging to the firm.

But even suppose that all of this $5,109.33 belonged to the firm, and there had been no debts owing by the firm, either to defendant in error or others, was he justified in drawing out these funds? If it was all firm money, he strictly would not, but would be liable to refund it to the firm. But suppose that were done, how could it benefit plaintiff in error? As partners, unless otherwise agreed, they would share equally in both profits and losses. Thus we have seen that the firm loss by the failure of E. I. Tinkham & Co. was $2,114, half of which would have to be borne by plaintiff in error, and the other half by defendant in error. One half of this loss would be greater than all of the funds he would be entitled to receive, even if the debt was collected of E. I. Tinkham & Co.

[159*] So *to require defendant in error to return the money

to the firm would avail nothing, as it would all be returned to him on an accounting between the partners.

For these reasons we are of the opinion that the judgment of the court below must be affirmed.

Judgment affirmed.

Thomas C. Forbes vs. Moses T. Hall.

Trusts and Trustees: *Patentee of land with notice of a prior entry, a trustee of the legal title.*

Where land is entered by one person, the purchase money paid, and a receiver's receipt taken therefor, and subsequently the entry is canceled by mistake (which, however, is subsequently corrected), and the land, after such erroneous cancellation, is entered by another person having full notice of the facts, and a patent therefor issued to him, he will hold the legal title as trustee for the benefit of the person who made the prior entry, and may be compelled by bill in equity to convey it to him.[1]

Same: *Second purchaser not entitled to be reimbursed purchase money, etc.*

Such subsequent purchaser will not, on a bill filed against him to compel a conveyance of the legal title, where he purchased with full notice and for the purpose of defrauding the prior purchaser of the land, be entitled to be reimbursed the purchase money and taxes paid by him on the premises.

Same: *Failure to demand title before suit, not a bar to relief.*

The fact that the prior purchaser makes no demand for the title before suit brought can have no other effect upon his rights than to relieve the second purchaser, the defendant, from the payment of the costs in the circuit court; it will not bar the right to a conveyance of the legal title.

Land Officers: *Can not divest the equitable title conferred by a legal entry.*

Where the entry of land is legal, the land officers can not by any act of theirs divest the equitable title acquired by the purchaser without his consent or the consent of his assignee, and confer the same upon a subsequent purchaser with notice.

Evidence: *To overcome sworn answer.*[2]

Where the sworn answer to a bill in chancery does not deny any material

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[1] See Wilson *v.* Byers, 77 Ill., 76.

[2] See Martin *v.* Dryden, 1 Gilm., 187; Barton *v.* Moss, 32 Ill., 50; Dunlap

allegation in the bill, the doctrine that it must be overcome by two witnesses has no application.

Error to Circuit Court of *McLean* County.

Bill in equity filed by defendant in error, Hall, against plaintiff in error, Forbes, to compel the conveyance by the latter to the former of certain land, the legal title to which was alleged to be in Forbes as trustee for the benefit of Hall.

The case is sufficiently stated in the opinion.

Glover, Cook & Campbell, for plaintiff in error. *R. E. Williams* and *A. B. Ives*, for defendant in error.

[167*] *Breese, J. The counsel for the plaintiff in error have argued this case as though it was an attempt to establish a resulting trust. Nothing of that kind is claimed. The question is, Has Hall the superior equity as against the legal title? If he has, then it was the duty of the court to regard Forbes as the trustee of that title for the benefit of Hall, and to decree it out of him for Hall's benefit.

The facts are uncontroverted. Forbes knew of the entry by Cheeny, in fact, he paid Cheeny's money into the land office for the land, and took the receipt in Cheeny's name. This entry was never abandoned, and though canceled, by mistake, when the mistake was corrected Cheeny's entry was in full force. The subsequent entry by Forbes cannot defeat Cheeny's right thus legally acquired.[1] Of Cheeny's rights Forbes had full notice, and that is sufficient to make him a trustee for Cheeny, or for his assignee, Hall. The land officers, the entry being legal, could not by any act of theirs divest the equitable title acquired by Cheeny without his consent, or the consent of his assignee, and the right exists in Hall to pur-

v. Wilson, id., 517; Preschbaker v. Feaman, id., 475; Stevenson v. Mathers, 67 id., 123; Fish v. Stubbings, 65 id., 492.

As to effect of answer where oath is waived or not required by statute, as in divorce cases, see Adlard v. Adlard, 65 Ill., 212; Coursey v. Coursey, 60 id., 186.

[1] A receiver's receipt only was issued to Cheeny, but the subsequent entry by Forbes was perfected by a patent.

sue the legal title into the hands of Forbes, who acquired it with full notice. The case of *McDowell v. Morgan et al.*, 28 Ill., 532, is "on all fours" with this case. The plaintiff in error cannot be permitted to hold the legal title he has acquired against the older equity of defendant in error.

Though the answer of plaintiff in error was sworn to, yet, as it does not deny any material allegation in the bill, the doctrine that it must be overcome by two witnesses has no application. As to the denial of a demand for a conveyance before suit brought, this will inure to the benefit of plaintiff in error, so far as to relieve him from the payment of costs in the court below, but no farther.

We are not disposed to allow the claim of the plaintiff in error to the purchase money and taxes he avers in his answer he has paid on this land. It is very evident that the plaintiff in error, contrary to equity and good conscience, with full knowledge of all the facts and circumstances attending the entry and purchase of the land by the defendant in error, bought to *deprive the defendant of it most un- [168*] justly, and in a mode thoroughly tinctured with fraud. We do not, therefore, think he is in a position to claim the equitable interposition of this court, or that such conduct furnishes a just foundation for the relief he seeks.

The averment in the answer that complainant did not make any demand for the title before suit brought, and no proof produced that he did make such demand, can have no other effect than to relieve the plaintiff in error from the payment of the costs, which the circuit court did, by adjudging the costs against the defendant in error.

Perceiving no error in the decree, it must be affirmed.

Decree affirmed.

GEORGE DUNBAR vs. MORRIS L. HALLOWELL et al.

JUDGMENTS: *Jurisdiction of superior court of another state presumed.*[1]

While the jurisdiction must affirmatively appear upon the record, when the question comes up directly upon appeal, or by writ of error; yet, when the question is raised collaterally, upon a judgment rendered by a superior court in another state, it will be presumed, in the absence of proof, that the court rendering the judgment had jurisdiction.

SAME: *Same.*

Where, therefore, in an action upon a judgment rendered in a superior court of the state of New Jersy, the record did not show affirmatively that there was service of process upon the defendant, nor that there was not, but was simply silent, it was *held*, that the judgment itself was *prima facie* evidence of jurisdiction.

ERROR to Circuit Court of *Cook* County.

The case is stated in the opinion.

Bates & Touslee, for plaintiff in error. *Fuller, Ham & Shephard*, for defendant in error.

[169*] *LAWRENCE, J.[2] This is an action of debt, brought upon a judgment rendered in the circuit court of Mercer county, in the state of New Jersey. It is not denied by the plaintiff in error that the court rendering a judgment was a superior court of general jurisdiction. The record does not show, affirmatively, that there was service of process on the defendant, nor does it show that there was not. It is simply silent.

It is contended by the plaintiff in error that this record is

[1] As to the presumption of jurisdiction of superior courts of general jurisdiction, see Wells *v.* Mason, 4 Scam., 84; Farmers' and Merchants' Ins. Co. *v.* Buckles, 49 Ill., 482, circuit court; Osgood *v.* Blackmore, 59 Ill., 261; Swearengen *v.* Gulick, 67 id., 209; Moffitt *v.* Moffitt, 69 id., 641, county court; Von Kettler *v.* Johnson, 57 id., 116, county court; Barnett *v* Wolf, 70 id., 76, county court; Wallace *v.* Cox, 71 id, 548; Harris *v.* Lester, 80 id., 307.

[2] This cause was submitted on printed briefs before the accession of LAWRENCE, J., to the bench, but not having yet been decided at that time, the record therein was allotted to him.

not even *prima facie* evidence of jurisdiction. This is the only question presented for the decision of the court.

We consider the point too well settled for serious controversy.

It was said in *Peacock v. Bell*, 1 Saund., 74, "the rule for jurisdiction is this, that nothing shall be intended to be out of the jurisdiction of a superior court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged." This language has been so often repeated by courts and text writers as to have become a maxim.

This principle applies as well to judgments rendered in other states of the Federal Union, when sought to be enforced in this state, as to judgments rendered by our own courts. Prior to the case of *Mills v. Duryee*, 7 Cranch, 481, as was remarked by this court in *Bimeler v. Dawson*, 4 Scam., 541, the judgments of courts of other states were generally regarded as foreign judgments, by the decisions of the state courts. But since that case, the current of authorities is almost uniform in favor of regarding them as substantially domestic judgments, for the purposes of evidence.

The rule in this state, in regard to jurisdiction, as settled by repeated decisions of this court, is, that while the jurisdiction must affirmatively appear upon the record when the *question comes up directly upon appeal, or by [170*] writ of error, yet when the question is raised collaterally upon a judgment rendered by a superior court in another state, it will be presumed, in the absence of proof, that the court rendering the judgment had jurisdiction.

The judgment itself is *prima facie* evidence of jurisdiction. *Horton v. Critchfield*, 18 Ill., 135; *Propst v. Meadows*, 13 id., 168; *Beaubien v. Brinkerhoff*, 2 Scam., 272; *Kenney v. Greer*, 13 Ill., 432; *Grigum's Lessee v. Astor*, 2 How., 319; *Foot v. Stevens*, 17 Wend., 483.

In the case first above quoted the record was from another state, as in the present case. We regard the rule as not only

well settled by authority, but as resting upon the soundest considerations of public policy.

Judgment affirmed.

George I. Bergen et al. vs. Peter Riggs.

Possession of Chattels: *Evidence of ownership.*[1]

Possession of personal property is *prima facie* evidence of ownership, sufficient till overcome by proof. Yet the *prima facie* case created by possession may be rebutted by the circumstances attending the possession.

Same: *Presumption of ownership, how rebutted.*

Since the army regulations of the United States require that all horses, as soon as acquired by the government, shall be branded with the letters "U. S.," if this brand is found upon an animal in the possession of another, that fact, unexplained, will overcome the presumption of ownership created by mere possession.

Same: *Same.*

Long and uninterrupted possession, or other circumstances, may, however, overcome the presumption of ownership in the government arising from such brand. Possession for one year would not, however, be sufficient to overcome such presumption.

Same: *Same.*

By the regulations of the U. S. service, when property is condemned it is required to be branded with the letter "C.," which, if shown, would be evidence that the government had parted with the title to property found in the possession of an individual.

Limitation: *Possession creates no bar against the government.*

Although long and uninterrupted possession of personal property may overcome the presumption of ownership in the government arising from its being branded "U. S.," such possession creates no bar by limitation to its recovery by the government.

Appeal from Circuit Court of *Warren* County.

Assumpsit by apppellants against appellee upon an alleged implied warranty of title to a certain horse sold by appellee to appellants.

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[1] See Brownell *v.* Dixon, 37 Ill., 197; Peters *v.* Smith, 42 id., 417; Amick *v.* Young, 69 id., 542.

Verdict and judgment below for the defendant.

The case is stated in the opinion.

T. G. Frost, for appellants. *A. G. Kirkpatrick*, for appellee.

Walker, C. J. It is insisted that the third instruc- [173]
tion given for defendant below is erroneous. It asserts that possession of personal property is *prima facie* evidence of ownership, and if defendant had possession for about one year prior to the sale, then, in order to overthrow such *prima facie* case, it was incumbent on plaintiffs to prove that the title to the horse was not in the defendant, but in the United States government. As a general proposition, possession of chattels creates a presumption of ownership, slight it may be, but sufficient until overcome by proof. Yet the *prima facie* case may be rebutted by the circumstances attending the possession. It may be rebutted by evidence either circumstantial or positive, but until rebutted, it is evidence of ownership.

If defendant in error was in possession as owner, then [174]
it raised the presumption of ownership, which plaintiffs in error were bound to rebut by showing that the ownership was in some other person, unless the circumstances rebutted the presumption. The evidence shows that the animal was marked with the government brand indicating that it was the owner. The army regulations require that all such property, as soon as acquired by the government, shall be so marked, which is for the obvious purpose of identifying it as property belonging to the general government. If this brand of the government was found upon this animal, that fact would, unexplained, overcome the presumption of ownership created by mere possession, but long and uninterrupted possession or other circumstances may overcome the presumption of ownership in the government, but will not bar its right to recover the property. The regulations also provide that when property for any reason is no longer needed by the government, or has become unfit for use, it is condemned and sold by the proper officer. And proof of such sale would overcome the

presumption of ownership by the government. That proof may be made by any legitimate evidence establishing such sales.

By the regulations of the service, when property is condemned, it is required to be branded with the letter "C.," which, if shown, is evidence that the government has parted with the title, when found in the possession of an individual. This presumption, it is true, may be rebutted by evidence. But in this case the government brand indicating that it was the owner, being found upon the animal, was evidence which rebutted the presumption of ownership created by possession of the property. And with this evidence of ownership in the government, possession for a year would not overcome the presumption that the government was still the owner. The evidence to overcome the presumption created by possession was present, and went with the possession during its continuance. Possession creates no bar by limitation against the government, and even if it could, one year is not sufficient.

This instruction as given was calculated to mislead, [175*] and, we *think, did mislead the jury. It should have been refused, or so modified as to have informed them that the government brand indicating ownership overcame the presumption created by possession. As the case will be passed upon by another jury, we deem it improper to discuss the weight of evidence in the case. The judgment is reversed and the cause remanded.

Judgment reversed.

Benjamin S. Prettyman vs. Elizabeth Walston et al.

Landlord and Tenant: *Lessee cannot deny landlord's title.*

Where the owner of the fee accepts a lease of the premises from another and goes into possession under it, neither he, nor his assignee, can dispute the lessor's right to demise, at least not until he shall have surrendered the possession to him.[1]

Same: *Same.*

Where the owner of certain premises in fee took a life lease thereof from another, and went into possession of the premises thereunder; and subsequently, while so in possession, the premises were sold on execution against him, but the purchaser at the execution sale did not take possession till several years thereafter, when, the execution debtor having executed to him a deed of the premises, he went into possession, and held the premises by his tenants: *Held*, that the inference was irresistible that he went into possession under the deed from the execution debtor, and not under his sheriff's deed; that he thereby became the assignee of the whole term; and that, as the covenants ran with the land, the lessor could maintain an action against him for the stipulated rents.

Evidence: *Preliminary proof to authorize introduction of record copy.*

Under the statute (Sess. Laws, 1861, 174) — providing that wherever upon the trial of any cause, any party thereto, or his agent or attorney in his behalf, shall orally in court or by affidavit to be filed, make oath that the original of any deed, conveyance, or other writing of or concerning lands, which may have been acknowledged or proved according to any law of this state, and which by virtue of such law shall be entitled to be recorded, is lost or not in the power of the party wishing to use it on the trial, the record of such deed as certified by the recorder in whose office it may have been recorded may be read in evidence in any court with like effect as though the original deed, etc., was produced and read — where the preliminary proof is the affidavit of one of the plaintiffs, and of their counsel and attorney, the first stating that he had not in his possession, power or control, the lease declared on, and the second stating that he had never had, since the commencement of the suit, the original lease set out in the declaration, and had never seen it, and that it was not within his possession, control or power to produce on the trial; the lease having been properly acknowledged and recorded, a record copy may properly be admitted in evidence.

[1] See Tinney *v.* Wolston, 41 Ill., 215; Alwood *v.* Mansfield, 33 id., 452; St. John *v.* Quitzow, 72 id., 334; Carter *v.* Marshall, id., 609.

SAME: *Record copy admissible where grantee does not produce the original upon notice.*

Where notice is given to the grantee in a deed to produce the original which is presumed to be in his possession and under his control, and it is not produced, a record copy of the deed is competent evidence.

SAME: *What passes by a general quitclaim deed, open to proof.*

Where a general quitclaim deed purported to convey certain tracts of land in a certain county, and also "all of our [the grantors'] right, title and interest at law or in equity in and to all lots and parts of lots" in a certain city in said county: *Held*, that it was open to proof what passed by the general description in the deed.

CONVEYANCES: *What will pass by a general quitclaim deed.*

A general quitclaim deed purporting to convey all the right, title and interest of the grantor at law or in equity, in and to all lots and parts of lots in a specified city, will pass the grantor's interest in a term for life in lots in said city.

TENANT FOR LIFE: *Must pay the taxes.*

The assignee of a life estate in land subject to the payment of a stipulated rent is bound to pay the taxes assessed upon the demised premises during his tenancy, and can not recoup or set off the same against the rent of the premises.

ERROR to the Circuit Court of *Tazewell* county.

Covenant by Elizabeth Walston and Abraham Walston, against Benjamin S. Prettyman for the recovery of rent alleged to be due plaintiffs from the defendant as assignee of a certain lease executed by plaintiffs to Richard H. Snell.

The case is sufficiently stated in the opinion of the court.

B. S. Prettyman, plaintiff in error, *pro se*. *E. N. Powell*, for defendants in error.

[187*] *BREESE, J. Some minor questions are suggested by the plaintiff in error, as arising on this record, but the principal one, and the one most elaborately argued, is the question of the liability of the appellant to discharge the taxes assessed against the demised premises. To determine [188*] this, it must first be shown what posi*tion the appellant occupied with reference to the premises. The action is brought against him as assignee of a lease executed by the appellees in right of Mrs. Walston, on the 7th of February, 1851, to Richard H. Snell, of certain lots in the city of

Pekin, for a term to continue during the life of Mrs. Walston, at an annual rent of three hundred dollars, payable monthly. Snell entered into possession during the term, and on the 24th of March, 1856, by deed, sold and quitclaimed to appellant, his heirs and assigns forever, certain tracts of land in town 26 north, range 4 west, and also all his interest in lots and blocks in Westley city, and in all lands adjoining Westley city; also, all his right, title and interest at law or in equity, to all lots and parts of lots in the city of Pekin, and all undivided interest in said town.

Appellant leased the premises to Stone and McDougal by deed, dated November 10, 1857, for the term of two years.

Appellant proved that the premises originally belonged to one Thomas Snell, who had been dead for a long time, and mortgaged by him, in his lifetime, to Gest and Roody, who foreclosed the mortgage, making appellees defendants to the suit, and under the decree of the court the premises were sold and purchased by Richard H. Snell in 1847. That in 1845, Ludwig and Kneedler obtained a judgment in the Tazewell circuit court, against Richard H. Snell, and in 1851, by an execution then issued, the premises were levied on as the property of R. H. Snell, and sold by the sheriff to appellant, to whom he executed a deed on the 19th day of June, 1852.

On the 3d day of July, 1852, appellant conveyed the premises to one James M. Ruggles, who, on the 22d of October, 1855, reconveyed the same to appellant.

On the sale by R. H. Snell to appellant, on the 24th of March, 1856, appellant took possession of the premises, and on the 24th of May, 1859, conveyed them to one Tinney, who took possession and held them at the time of the trial of the cause.

These being the prominent facts of the case, the question arises, under what title must the appellant be held to have entered into the premises; under that of R. H. Snell, the reve*rsioner, the owner of the fee, or as his assignee [189*] under the lease? Appellant claims he was in under the reversioner, and therefore not liable for the rents reserved,

and upon this question depends the other raised by the defendant's third plea and subsequent pleadings arising thereout.

The plea states in substance that the premises were annually assessed for state, county and city taxes, which the plaintiffs (appellees) were legally bound to pay, and which they neglected to do, and to enable appellant to enjoy the premises, he had been compelled to pay those taxes, amounting annually to three hundred dollars, and that the whole sum paid for taxes amounts to three thousand dollars, which appellant offers to recoup against the damages claimed for the nonpayment of the rent, and that they amount to more than all the rent in arrears.

A demurrer to this plea would have brought up the question as to where the liability lay to pay these taxes, and have superseded these multiplied pleadings by replications and demurrers thereto with which the record is incumbered.

The record does not show how appellees became clothed with the title to these premises, or explain why it was, Richard Snell, owning the fee, consented to take a life lease from appellees; but this does not affect the merits of the controversy, on the principle that Snell, having accepted the lease and, gone into possession under it, cannot, nor can his assignee, dispute the lessor's right to demise, at least not until he shall have surrendered the possession to them.

It will be observed that the sheriff's deed to appellant was long prior to Snell's deed to him, the first being executed on the 19th of June, 1852, and the last on the 24th of March, 1856. At the time of the sale by the sheriff and the execution of the deed by him, Richard H. Snell held the lease executed by appellees; he was at that date their lessee and in possession. Appellant did not take possession under the sheriff's deed, although he sold to Ruggles in a few weeks thereafter, nor is there any evidence that Ruggles ever took possession, or that appellant took possession under Ruggles' reconveyance to him in October, 1855.

After the deed from Snell of March, 1856, it is in evi- [190] dence appellant took possession, Snell having abandoned the premises himself, leaving his family in the house for a few days, when they were taken away. In November, 1857, appellant leased the premises to Stone and McDougal for two years. The inference then is irresistible, that appellant went in under the deed from Snell and thereby became the tenant of appellees, and having thus assumed that relation, and entering under that title and the tenancy still existing, he cannot be permitted now to dispute it. *Rigg v. Cook*, 4 Gilm., 351; *Dunbar v. Bonesteel*, 3 Scam., 34; *Ferguson v. Miles*, 3 Gilm., 359; *Tilghman v. Little*, 13 Ill., 241.

The appellant became by Snell's deed, the assignee of the whole term, and as the covenants run with the land, the lessor can maintain an action against him for the stipulated rents. Taylor's Land. and Ten., 218; *Armstrong v. Wheeler*, 9 Cow., 88; *Williams v. Woodward*, 2 Wend., 487; *Acker v. Witherell*, 4 Hill, 112.

But it is urged by the appellant, that the court erred in admitting in evidence the lease from appellees to R. H. Snell, it being a record copy only.

The objection was that no foundation had been laid to authorize the introduction of a copy.

The preliminary proof was the affidavit of Walston, one of the plaintiffs, and of James Roberts their counsel and attorney. Walston, sworn, stated, that he had not in his possession, power or control the lease declared on. Roberts stated that he never had, since the commencement of the suit, the original lease set out in the declaration, and has never seen it, and that it is not within his possession, control or power to produce on the trial.

Under the rules established by this court in *Rankin v. Crow*, 19 Ill., 626; *Booth v. Cook*, 20 id., 129, and *Stowe v. The People*, 25 id., 81, this preliminary proof would not have been sufficient, but the legislature has since interposed and by an act to amend chapter 24, title "conveyances," have provided, whenever upon the trial of any cause in law or equity,

any party to the cause or his agent or attorney in his
[191*] behalf shall *orally in court, or by affidavit to be filed in the case, testify and state under oath that the original of any deed, conveyance or other writing of or concerning lands, tenements and hereditaments, which may have been acknowledged or proved according to any law of this state, and which by virtue of such law shall be entitled to be recorded, is lost, or not in the power of the party wishing to use it on the trial, the record of such deed, as certified by the recorder in whose office it may have been recorded, may be read in evidence in any court in this state with like effect as though the original deed etc., was produced and read. Sess. Laws 1861, p. 174.

This evidence fulfilled the conditions of this statute, the lease having been properly acknowledged and recorded in the proper office.

The deed from Snell to appellant was objected to as evidence on the ground that it was only a general quitclaim deed, and the land claimed was not named in it, and that Snell had other lands in the county designed to be and actually conveyed by it.

The objection has no foundation, since it was open to proof what passed by the general description in the deed. The record of the deed was competent evidence, notice having been given to appellant to produce the original, which is presumed to be in his possession and under his control. What it proved, whether it conveyed the leasehold interest or not, was another question, and on that question we have no doubt. The estate conveyed by the lease is embraced in the words "all our right, title and interest at law or in equity in and to all lots and parts of lots in the city of Pekin." Snell had a legal estate in the lots leased, and they passed by the deed. *Doty v. Wilder*, 15 Ill., 411.

Appellant having entered under the lessor, and thereby become the tenant of the lessor of the whole term, he was, from his position, bound to pay the annual taxes assessed upon the premises while he occupied them.

Mrs. Walston was tenant for her life of the premises, and appellant her lessee by assignment, and the doctrine is that it *is the duty of such tenant to pay all the [192*] taxes assessed during his tenancy, and if he neglects it and suffers the land to be sold for the taxes, and purchases it himself, or suffers a stranger to purchase, and then procures a release to himself, he can acquire no right to the estate against the owner in fee. Blackwell on Tax Titles, 472; *Varney v. Stevens*, 22 Me., 361; *Young v. Hughes*, 5 Gil. & Johns. (Md.), 67; *Mc Williams' Lessee v. Robbins*, 5 Ohio, 28; *Cairns and wife v. Chabert and wife*, 3 Edw. Ch., 312; *Burhans et al. v. Van Zandt et al.*, 3 Seld., 523; *Trustees of the Village of Elmira v. Dunn*, 22 Barb., 402.

But if the appellant did enter into possession under the sheriff's deed, still, having appellees's life estate by assignment from R. H. Snell, he was bound to pay appellees the stipulated rent without any deduction for the taxes, he being bound to pay them either as assignee of the term, or as owner of the fee, both estates being united in him. He cannot, in any shape, set up the taxes as a deduction against the rent, or recoup them, as he was bound to pay them.

Much controversy is made over the pleadings in the cause which we do not deem necessary to notice particularly, the merits of the case being contained in the points we have discussed and decided. We will say, however, that a record showing pleadings so confused and irregular, as they appear in this, has rarely come before this court. We have endeavored to find the grains of wheat, and having found them, have disposed of them as we think they should be according to the law, as we understand it. The judgment of the circuit court must be affirmed.

Judgment affirmed.

[193*] *John C. Holliday and Hiram Reed vs. Henrietta Burgess, Executrix of James Burgess.

Sales: *When title passes without delivery.*

As between the parties, the title to personal property passes without any delivery, when the sale is completed. An agreement to sell an article by weight or measure, where the article is identified and the price agreed upon, may be a complete sale, if the parties intended it as such, although the article sold is not weighed or measured.[1]

Instructions: "*Believe from the evidence.*"

An instruction which does not contain the words, "from the evidence," after the word "believe," is erroneous in form; but the appellate court will not reverse a judgment for that defect, unless it appears that the jury were misled thereby.[2]

Appeal from Circuit Court of *Kankakee* County.

The case is sufficiently stated in the opinion.

Lorraine & Bonfield and *Leland & Blanchard*, for appellants. *Glover, Cook & Campbell*, for appellee.

Beckwith, J. This is an action of replevin for a quantity of corn. The plaintiffs claim title to it under a purchase from Augustus T. Ingham, whom they claimed to be the owner. The defendant claimed that the corn belonged to George H. Ingham, and, as the sheriff of Kankakee county, he had levied upon it as the property of the latter by virtue of an execution against him. On the trial, there was evidence tending to prove that Augustus T. Ingham raised the corn on the Ingham place, and that it was his property, and the sale to [194*] the plaintiffs; and there was *also evidence tending to prove that George H. Ingham was the owner of the corn.

The third instruction given for the defendant was, that "if they (the jury) believed from the evidence that Augustus T.

[1] See Howard *v.* Babcock, 21 Ill., 263; Sidwell *v.* Lobby, 27 id., 438; Corgan *v.* Frew, 39 id., 31; Graff *v.* Fitch, 58 id., 373; Seckle *v.* Scott, 66 id., 106; Shelton *v.* Franklin, 68 id., 333; Barrow *v.* Window, 71 id., 214; Webster *v.* Granger, 78 id., 230; Straus *v.* Minzesheimer, id., 492

[2] See Miller *v.* Balthasser, 78 Ill., 302.

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Ingham agreed with Holliday & Reed to sell them all the corn he raised on his place in 1860, more or less, at a stipulated price, and that the corn in dispute was raised in 1860 on said place, yet that, of itself, did not give Holliday & Reed the property in the corn in question, and the jury should find for the defendant." We think this instruction was likely to mislead. As between the parties, the title to personal property passes without any delivery, whenever the sale is completed. An agreement to sell an article by weight or measure. where the article is identified and the price agreed upon, may be a complete sale if the parties intended it as such, although the article sold is not weighed or measured. *Riddle v. Varnum*, 20 Pick., 280.

The objection to the instruction is that it assumes that, under the evidence, an agreement to sell was not and could not be a complete sale. The evidence tends to establish that the corn in controversy had at that time been harvested, and that in pursuance of the agreement it was afterwards set apart for the plaintiffs. We think it should have been submitted to the jury, to determine whether the parties had, by the agreement and the acts done under it, completed the contract between them. *O'Keefe v. Kellogg*, 15 Ill., 347; *Wade v. Moffat*, 21 id., 110. If the agreement and the acts done under it were intended by the parties as a completion of the contract, the title to the corn passed as between them.

The second instruction was erroneous in form in not containing the words "from the evidence," after the word "believe;" *Ewing v. Runkle*, 20 Ill., 445; but we should not reverse a judgment for that defect, unless it appeared that the jury were misled thereby.

For the error in the third instruction the judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

[*195] *The Chicago, Burlington and Quincy Railroad Company vs. The President and Trustees of Knox College.

Ejectment: *When notice to quit is necessary.*

After long continued possession of land by a tenant, under a license to enter and occupy, whether he is to be treated as a tenant from year to year, or at will, he is entitled to notice to quit before an action of ejectment can be maintained against him. Where the entry is with a permission from the owner, the person entering is not a wrong doer, and cannot be until required by demand to surrender the possession, and refusal.

When the entry is without consent, it is otherwise, as his possession is wrongful. So, where his occupancy subsequently becomes wrongful.

Same: *Same.*

Where a railroad company entered upon land in 1854 for its right of way, had the damages resulting therefrom duly assessed, and, with the consent of the owner, constructed and operated its road on the land; and the owner of the land brought an action against the company for the recovery of said assessment and recovered a judgment therefor, which was never satisfied; and subsequently, in 1859, brought an action of ejectment against the lessee of said company who was operating said road: *Held*, that, such lessee having succeeded to the rights of its lessor, and the lessor's entry having been rightful, the action could not be maintained without first giving a notice to quit.

Same: *Length of notice.*

It may be that when the purpose of a rightful occupancy is not agricultural, a shorter notice will suffice, than where a question of emblements is involved. Still it would have to be reasonable, so as to afford the occupant reasonable time within which to surrender possession.

Appeal from Circuit Court of *Peoria* County.

The case is sufficiently stated in the opinion.

Walker & Dexter, for appellant. *Wead & Cochran*, for appellees.

[201*] Walker, C. J. *This was an action of ejectment,[1] instituted by appellees, for the recovery of a strip of land, over which appellant's road is located. It is stipulated that the Peoria and Oquawka Railroad Company took pos-

[1] Brought at June term, 1859.

session of the land in 1854, as right of way, and constructed their road thereon. That they had the damages assessed, growing out of the appropriation of the land for that purpose. That appellees, before the commencement of this suit, brought an action for the recovery of the damages of the Peoria and Oquawka Railroad Company, and obtained a judgment, which has never been satisfied. That appellants were in possession at the commencement of the suit, as lessees of the Peoria and Oquawka road, and were using the same, and running their cars on the road. It appears that at the time this road was being constructed on the land in controversy, the engineer who had charge of the work, had frequent conversations with the president, and a portion of the trustees, who admitted that the company had a right to construct their road on this land. This is evidence of a consent on the part of the board of trustees of the college, that the lessor of appellant might build and operate their road on this land, and appellant has succeeded to their rights under the lease.

This presents the question whether a notice to quit was necessary before this action could be maintained. After such long continued possession by a tenant, under a license to enter and occupy, whether he is to be treated as a tenant from year to year, or at will, he has the right to notice to quit, before an action can be maintained. 4 Kent, 112; *Jackson v. Livingston*, 1 Johns., 322. In that case it was held, that where a person entered into possession of land, with the permission of the owner, as a mere occupant, without payment of rent, and made improvements, and afterwards sold his improvements to another person, who went into possession, and the owner sold the land, and his grantee brought ejectment, the person purchasing the improvements of the mere occupant must have notice to quit, and this was after eighteen years' possession. He was treated as a tenant from year to year.

In the subsequent case of *Jackson v. Laughtread*, 2 Johns., *75, the same rule was there announced. It [202*] was there held that a mortgagee, before he brings ejectment against the mortgagor, must give six months notice

to quit. This case, although it may be that the principle would not be applied in a case between mortgagee and mortgagor, establishes the principle that a tenant or occupant, having no specific agreement for possession, if not in wrongfully, is entitled to notice.

Again, in *Jackson v. Wheeler*, 6 Johns., 272, it was held, that where a person entered into possession, under permission from the owner, as a mere occupant without paying rent, and the owner sold the land, his grantee must give notice to the vendee of the occupant who had acquired possession, before ejectment could be maintained. And this, too, where the occupant disclaimed to hold under the owner, but the disclaimer was made after suit was brought. In that case a recovery was defeated for the want of a notice to quit. This seems to be the English rule, and is recognized in many, if not all, of the states of the Union, in which the common law has not been repealed.

The rule is reasonable, independent of the question of emblements. When a person has entered, with a permission from the owner, he is not a wrong-doer, and cannot be, until required by demand to surrender the possession, and refuses. When an entry is without consent, it is otherwise, as his possession is wrongful. But where he had license from the owner, he should not be held liable for costs, until his possession has become tortious. It may be that when the purpose of the occupancy is not agricultural, that a shorter notice will suffice, than where a question of emblements is involved. Still it would have to be reasonable, so as to afford the occupant reasonable time within which to surrender possession. If the occupant entered without right, or if his occupancy beomes wrongful by disclaiming to hold under the owner, or on a refusal to surrender in a reasonable time after demand of possession, the owner might recover.

In this case it appears that the original entry was rightful, and appellants were in possession as the lessees of the first occupants. They did not assert title in their own [203*] right, or in *hostility to appellee's title. Until they

have done so, or have refused to surrender possession after reasonable notice, they are not liable to be evicted and dispossessed. The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

The City of Chicago vs. Edwin C. Larned et al.

Taxation: *Equality and uniformity indispensable.*

Under sections 2 and 5, article 9 of the Constitution of 1848, the principles of equality and uniformity are indispensable to all legal taxation, whether of a general or local character.[1]

Special Assessments: *Not taxes.*

A special assessment is not a tax, but an exercise of the power of eminent domain.

Same: *Must make just compensation.*

Special assessments, being referable to the power of eminent domain, must, under section 11, article 13, Constitution of 1848, be held to be invalid unless they make "just compensation" in some mode, either by money or benefits.

Same: *Equality and uniformity.*

Although this compensation may be made by benefits, yet when these are exhausted, it then becomes a question of taxation, and the principles of equality and uniformity must apply.

Same: *Just compensation not a matter of form.*

The just compensation required by the constitution is a matter of substance and not of form; and a proceeding which ignores this fact will be invalid.

Same: *Assessment of injuries and benefits a judicial proceeding.*

The assessment of injuries and benefits is in the nature of a judicial proceeding and must be surrounded with some sort of judicial sanc-

[1] See the People *v.* Bradley, 39 Ill., 130; City of Ottawa *v.* Spencer, 40 id., 211; Chicago *v.* Baer, 41 id., 306; Bureau County *v.* C., B. & Q. R. R. Co., 44 id., 229; Chicago & N. W. R. R. Co. *v.* Boone County, id., 240; St. John *v.* East St. Louis, 50 id., 92; Ducat *v.* Chicago, 48 id., 172; Primm *v.* City of Belleville, 59 id., 142; Lee *v.* Ruggles, 62 id., 427; Chicago & A. R. R. Co. *v.* Livingston County, 68 id., 458; The People *v.* Barger, 62, id., 452; Madison County *v.* The People, 58 id., 456; Sherlock *v.* Village of Winnetka, 68 id., 530.

tion. The making of an estimate by the common council, in and by the act of ordering the improvement, that the benefits to the property assessed will be equal to the cost of the contemplated improvement, will not be sufficient.

SAME: *Principle to be adopted in making.*

The principle to be adopted in making improvements, in which the whole public are interested, through the agency of special assessments, is to assess to each lot the special benefits it will derive from the improvement, charging such benefits upon the lots, the residue of the cost to be paid by equal and uniform taxation.

SAME: *Invalid, if made on basis of frontage.*

An assessment for improvements, made on the basis of the frontage of lots upon the street to be improved, each separate block, lot, etc. to sustain, as nearly as may be, the cost and expense of making the improvement upon that half of the street directly in front of the same, and no compensation being provided for, is invalid as an exercise of the power of taxation, since it contains neither the element of equality nor uniformity; and also as an exercise of the right of eminent domain, since it provides no compensation.[1]

CONSTITUTIONAL LIMITATIONS: *Upon power of the legislature.*

A state legislature may do anything not inhibited by the constitution. But the prohibition need not be express; a repugnancy to the general provisions of the constitution will be a sufficient prohibition.

ERROR to Superior Court of *Chicago.*

The case is sufficiently stated in the opinion of the court.

Francis Adams, City Attorney, and *Scammon*, *McCagg & Fuller*, for plaintiffs in error. *Arrington & Dent* and *Barker & Tuley*, for defendants in error.

[267*] *BREESE, J. At the February term, 1864, of the superior court of the city of Chicago, the city collector filed his report, and applied for judgment upon a special assessment warrant, for curbing, filling and paving with Nicholson pavement, Wabash avenue, from Randolph street to Fourteenth street, against the delinquent owners for their several assessments. Various objections were made to the appli-

[1] See Chicago *v.* Baer, 41 Ill., 306; City of Ottawa *v.* Spencer, 40 id., 211; Holbrook *v.* Dickinson, 46 id., 285; St. John *v.* East St. Louis, 50 id., 92; Creote *v.* Chicago, 56 id., 422; Hundley *v.* Commissioners of Lincoln Park, 67 id., 559.

cation by these delinquents, some of which the superior court allowed, and refused the application. The city excepted to this ruling of the court, and have brought the case here by writ of error, and assign the same as error.

We propose to examine but one question raised by the parties, and discussed here with great ability, as the decision upon that determines the whole controversy, and that is, Are the provisions of sec. 21 of chap. 7 of the revised charter of the city of Chicago, under which the assessment in question was made, in harmony with the provisions of sections two and five, article nine, and of section eleven, article thirteen of the constitution of this state?

That section of the charter provides, whenever any order is passed by the common council, for the filling, grading, leveling, paving, curbing, walling, graveling, macadamizing, planking or repairing of any street, lane, alley or highway, the commissioners of the board of public works shall forthwith proceed to assess the amount directed by the common council to be assessed on the real estate fronting or abutting on the contemplated improvement. Said assessment shall be made in such manner as nearly as may be, that each separate block, lot, sub*lot, piece or parcel of land, on either side of [268*] the street or part of the street to be improved, shall sustain the cost and expense of making or completing the improvement upon that half of the street directly adjacent to, or in front of the same.

Section 2 of article 9 of the state constitution declares that the general assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his or her property.

Section five of the same article provides that the corporate authorities of counties, townships, school districts, cities, towns and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same.

Section 11 of article 13 declares that no person's property

shall be taken or applied to public use without the consent of his representatives in the general assembly, nor without just compensation being made to him.

The plaintiff in error takes the ground, that this section of the charter is an express and lawful grant of power to the authorities of the city of Chicago, in view of these constitutional provisions, to impose the cost of improving the streets in that city upon the adjacent property, in proportion to the foot front; that the legislature, both under the old and the present constitutions, has made similar grants of power to various other cities and towns; that these grants have never before been assailed as unconstitutional; that for more than twelve years this court has maintained the proposition that assessments for improving streets are not "taxes," within the meaning of that word as used in section 5 of this article; that the same course of decision has prevailed in all the other states where this question has been raised, and that without regard to the manner in which the imposition was laid; that the authorities upon which the first case decided in this state is founded do not make any distinction as to the manner in which the tax is laid, in deciding whether or not it is a tax as that word is used in either state constitutions or general laws; and [269*] they argue that *the true distinction between taxes and assessments lies in the objects for which they are laid, and not in the manner of apportioning them among those who are to bear the burden; that the construction of the law and the constitution contended for will give both full effect, and preserve their consistency with each other, while the contrary construction will disregard a legislative interpretation of the constitution continued for a long series of years; will overthrow similar provisions in a large number of town and city charters, and also sales of property for the nonpayment of such impositions; will overthrow all the previous decisions of this court, or place them on new and unlooked-for grounds, thereby causing great confusion, uncertainty and loss in the exercise of this class of corporate powers, and for the time, wholly suspend all street improvements in towns and cities

organized under similar charters, and run counter to the course of authority on the same question in other states.

The defendants in error, on the other hand, insist that the impost is a tax for corporate purposes, and, not being "uniform," is therefore, unconstitutional. That, if not a tax, it is an exercise of the right of eminent domain, and is unconstitutional, because it does not provide for "just compensation" to those whose money is taken, and, therefore, the assessment must be declared void under the constitution, whether considered as a tax or as an attempt to exercise eminent domain. They insist, that no one of the decisions of this court goes to the extent of deciding such assessments valid, and that only in states having constitutional provisions different from ours on this subject, and where the taxing power of the legislature is, in a great measure, unlimited, has this power been judicially upheld. The summary of their argument presents these points. The money attempted to be collected is claimed either under the taxing power, or in the exercise of eminent domain. If it be by taxation, it is for "corporate purposes," or it is not, and if for corporate purposes, it is unconstitutional, because not uniform. If not for corporate purposes, it is unconstitutional, because corporate authority can only tax for corporate pur*poses; hence it follows, this money is not sought [270*] to be taken by taxation. If the money is taken by eminent domain, the method of ascertaining a just compensation must be provided by the act which directs the taking; but there is no method of ascertaining a just compensation provided in the charter, therefore, the money is not taken by eminent domain; hence it follows, the act of taking, and the proceedings to take it, are unconstitutional.

The plaintiffs in error insist, that this court has decided that a special assessment to defray the expenses of a particular local improvement, such as this in question, is not a tax. Reference is made to several cases which we will notice, and show the grounds on which this opinion was based.

The first case arose under the old charter of the city of Chicago, on a proceeding, on the part of the city, to widen an

alley into a street which would include a portion of the property there situate, claimed by the canal trustees, and which was assessed for its proportion of the expenses of the improvement. The principal question made in that case was, whether the real estate belonging to the trustees of the Illinois and Michigan canal was liable to assessment of this character. The act of the legislature, granting these lands to the trustees provided, that they should be exempt from taxation of every description, by and under the laws of the state, until after they shall have been sold and conveyed by the trustees. It was contended that the assessment fell within this exemption. The court held, that the exemption must be regarded as applying only to taxes levied for state, county and municipal purposes. In other words, for purposes of revenue, to defray the expenses of such government, and conducting its operations. It was further held, that the assessment in question had none of the distinctive features of a tax; that it was imposed for a special purpose, and not for a general or public object. The courts say, the improvement is made for the convenience of a particular district; they further say, the property there situated is required to bear the expense in the proportion in which it is benefited, and that the assessment is precisely in [271*] the ratio *of the advantages accruing to the property in consequence of the improvement. It is but an equivalent, a compensation, for the increased value the property derives from the opening of the street. *Canal Trustees v. City of Chicago*, 12 Ill., 406. This was not a case where the assessment was made upon the "frontage," but upon the principle of burden and benefit in view of sec. 11 of art. 13. Compensation was made for the property taken, by the value added to the remainder from opening the street.

The case of *Higgins v. The City of Chicago*, 18 id., 276, was an application for a *mandamus* to compel the city to collect and pay to the relator the damages which had been awarded him, consequent upon laying a street by the city, over a portion of his land within its limits. It was a proceeding in

the exercise of the power of eminent domain, and had no connection with the taxing power.

The City of Chicago v. Colby, 20 id., 614, merely reiterates the language of the court in 12 id., 406, that a special assessment is not a tax.

In *McBride v. The City of Chicago*, 22 id., 576, where the mode in which the city council had exercised the power conferred on it by its charter, to open, widen and extend streets, was considered, it appeared that under the charter, as it then existed, the council were required to appoint commissioners to ascertain and assess the damage and recompense due the owners of lands affected by such improvements, and also to determine what persons would be benefited by the improvement, and to assess the damages and expenses thereof, on the real estate of the persons benefited, as nearly as may be, to the benefits resulting to each. The court said, while an assessment of this character is not a tax, and differs in some respects from it, it is, nevertheless, in many respects, similar. They both proceed to raise money by authority of law from the citizen, without his assent, and are required to proceed upon the basis of equality, either as to benefits conferred, or in proportion to the ability of the person taxed. Uniformity and equality are, in each, observed as a principle of justice and duty.

*The case of *City of Peoria v. Kidder*, 26 id. 351, [272*] decides that the city, under this charter, had the right to extend the street, to have the benefits and damages assessed, and the property in question was liable to the burden. It reiterates the doctrine of the other cases cited, that assessments of this character are not taxes, and, therefore, not embraced in, or regulated by, the provisions of the constitution on that subject. It is, in substance, there said, that when, in opening, widening or extending a street, it becomes necessary to appropriate private property to the purpose, the owner must have just compensation made to him, by the public at large, by the city, or by the person deriving a pecuniary benefit from the improvement. This was a requirement of the 6th section of the charter of that city, which provided, that on award of

damages by the commissioners to the owners of real estate, allowance should be made for any benefit which such owners might respectively derive from such improvement. The whole case shows an exercise of power under the right of eminent domain.

The case of *The Town of Pleasant v. Kost*, 29 id., 490, holds that an assessment of labor for the repairs of roads and streets is less like a tax than an assessment imposed for widening a street; that the right to impose labor for the repair of a public highway is not to be regulated by the limitation on the taxing power. The number of days levied, and the sum which may be received by commutation, must be uniform within the limits of the district or body imposing the same.

All the cases decided by this court, so far as we have examined, hold that these special assessments are not taxes, for the reason, as plainly appears from the opinions delivered, that when laid in the ratio of benefits they are not burdens. It is that element which has reconciled this court to their imposition, and induced the court to range the power to make them, under the power of eminent domain, the "just compensation" being the benefits flowing to the property holder from the improvement, and which are required to be estimated together with the damages. No case can be found, decided by [273*] this court, on a principle *variant from this, the equation of benefit and burdens forming the ground work of all of them.

How is it in other states? The case of *Garrett v. City of St. Louis*, 25 Mo., 505, recognizes this principle of benefits. The court say that the tax in question is not a property tax within the meaning of the constitution. The tax is local, and for local purposes, and is a tax upon benefits and not directly upon property. The cost of the public benefit is made a public burden, and the expense of the individual benefit is placed upon the shoulders of the person who receives it.

The case of the *Egyptian Levee Co. v. Hardin*, 27 id., 495, decides that, notwithstanding the provision of the constitution which required property to be taxed according to its value, a

direct tax of one dollar per annum upon land adjoining a proposed improvement, to defray the expenses of it, was valid. That clause does not apply to local assessments, when the money raised is to be expended on the property taxed.

The case of *Weeks v. The City of Milwaukee*, 10 Wis., 242, holds, that these assessments for building streets, sidewalks, etc., are an exercise of the taxing powers of the state, and that the rule of uniformity prescribed by the constitution extends to taxation by corporations, and that this uniformity implies equality in the burden, as held in *Bank v. Hines*, 3 Ohio, 15. This equality in the burden constitutes the very substance designed to be secured by the rule. But the principle upon which these assessments rest is clearly demonstrative of this equality.[1] It requires every lot owner to build whatever improvements the public may require, on the street in front of his lot, without reference to inequalities in the value of the lots, in the expense of constructing the improvements, or to the question whether the lot is injured or benefited by their construction. In front of one lot, the expense of building the street may exceed the value of the lot, and its construction may impose on the owner additional expense to render his lot accessible. In front of another lot, of even much greater value, the expense is comparatively slight. These inequalities are obvious, and the learned judge delivering the opinion says he had always *thought the principle of such [274*] assessments was radically wrong. The court held, however, that unsound as the principle might be, on which the power was based, yet the legislature had the power, under the constitution, to establish such a system. Was it not for the constitutional provision, or, if that was the same as ours, the court would have held the assessment void.

The case of *Williams v. The Mayor, etc., of Detroit*, 2 Mich., 566, presented the question discussed here, whether the money attempted to be raised by means of an assessment to defray the expenses of improving a public street is sought to be taken by virtue of the right of eminent domain, or in the

[1] *Quære*, its inequality.

exercise of the sovereign power of taxation. The court decides that it is not in right of eminent domain, but was in the proper exercise of the powers of taxation, conferred by the charter on the common council of the city. That charter provides that the common council shall have full power and authority to provide funds for defraying the expenses of such paving of streets, or sidewalks, as may be deemed necessary, either by assessment on the owner or occupant of such lot, on premises in front of, or adjacent to, which such streets or sidewalks may be directed to be paved or repaired, or otherwise, as they may direct; and such assessment was, by an amendment to the charter, declared a lien on the lot in front of which the street or sidewalk may have been repaired or paved. The tax was sustained on the express ground that it was apportioned through a district.

In the case of *The People ex rel. Griffin v. The Mayor of Brooklyn*, 4 Comst., 419, the decision is placed expressly on the ground that such assessments are lawful and constitutional taxation. The learned judge delivering the opinion says: "the assessment, therefore, was taxation and not an attempt to exercise the right of eminent domain. And if there be any sound objection to the assessment as a tax, it must be an objection which applies to the principle on which the tax is apportioned, because the object for which the money was to be raised is without dispute, one for which taxation by a different rule of apportionment would have been lawful." He further says, "that the power of taxation, and of ap-
[275*] portioning taxation, or *of assigning to each individual his share of the burden, is vested exclusively in the legislature, unless this power is limited or restrained by some constitutional provision. He further says, there is not, and since the original organization of the state government, there has not been any such constitutional limitation or restraint.

The case of *Brewster v. City of Syracuse*, 19 N. Y., 116, proceeds on the same principle as the case in 4 Comstock.

In *Schenley and wife v. The City of Alleghany*, 25 Penn., 128, it is held that the act of assembly relating to the paving

and grading of streets in the city of Alleghany, and the assessment of the expense of the same upon the owners of lots fronting on such streets, and the manner of collecting such assessments, are a proper and constitutional exercise of the taxing power by the legislature. The reason assigned is, that it imposes the burdens exactly where the benefits are conferred.

The case of *Foster v. The Commissioners of Wood County*, 9 Ohio, 540, simply decides that the levy of eight cents per acre on all lands within a given distance on each side of a certain turnpike road is an assessment, and not a tax, and as such, authorized by the constitution as it contains the principle of benefit.

In neither of the states whose courts have made the decisions we have cited, can there be found the same constitutional provisions as are contained in sections two and five of the ninth article of our constitution.

Applying, then, the test of our constitution to the principles established by these cases, we are unable to concur in them.

The framers of our constitution have taken unexampled pains by these separate sections to affirm the principles of "equality" and "uniformity" as indispensable to all legal taxation, whether general or local. Section five is believed to be peculiar to our constitution, and manifests the great anxiety of its framers to place every possible species of taxation upon the only equitable basis conceivable, and is believed to be more stringent than any provision in any other state constitution on the same subject.

If this assessment is to be regarded as an exercise [276] of the taxing power, it cannot be denied that it flagrantly violates these principles of the constitution. To give an example: A and B may own, respectively, two lots lying side by side. The natural surface of A's lot may be twenty or more feet above the established grade, and composed of rocks unfit for building purposes. The natural surface of B's lot may be at grade. An order is passed by the common

council to open and grade the street projected in front of these lots. It will cost B nothing, or the merest trifle. It will cost A all his lot will be worth after the street is opened. To what does this amount to but a confiscation of A's lot for B's benefit, and that of others situated like him? Is it not absurd to call this equal and uniform taxation? Regarded in the light of a tax, then, it is wholly indefensible.

But the plaintiffs in error hope to escape this conclusion under the guise that it is a "special assessment," and not a tax. Call it a special assessment, then it is demanded on what ground, apart from the taxing power, can property be taken by way of a local or special assessment? As we understand it, the property of a citizen can be divested only in one of four ways: 1. For taxes; 2. For public uses by right of eminent domain; 3. As a penalty for disobedience to, or infraction of, some public law; and, 4. To enforce payment of his debts.

If, then, a special assessment was not a tax, it must be placed where the defendants in error place it, under the exercise of the power of eminent domain.

The first mode being ignored by this court as the basis of these assessments, they must of necessity be held to come under the right of eminent domain. They cannot be referred to any other constitutional provision. Power of every description must be referred to some certain source — "some local habitation" must be assigned to it, and if none can be, then it is safe to say it is "vagrant power," or that it has no existence.

How can this right of eminent domain be exercised? Only under the constitution, by making just compensation. Is such compensation made in this proceeding? It has been decided by this court, in which this court, as at present composed, [277*] does not wholly concur, that this compensation may be either in money or benefits. It is solely on this ground that such assessments have been sustained by this and by other courts. From the case of the *Canal Trustees v. The City of Chicago*, 12 Ill., 406, to the present time, the ruling

principle of all of them is, that as the assessments are in the ratio of advantages or benefits, they are lawful; that they are an equivalent for the increased value the property derives from the improvement. The court did not, in any of the cases, find it necessary to specify the clause in the constitution, under which the assessment was justifiable, but as they had already decided it was not a tax, and as they justified it on the ground of benefits, the conclusion is irresistible that they considered it an exercise of the power of eminent domain.

If, then, those special assessments must be referred to this power, as they clearly must, if not a tax, they must be held to be invalid unless they make "just compensation" in some mode, either by money or by benefits. There is no pretense in this proceeding of such compensation being in any way provided for or even contemplated. There is no assessment of special injury or special benefits to individual lots. In the case we have above put, the entire value of A's lot, even estimated after the improvement is made may be taken, and not ten dollars of B's. Where, then, is the benefit to A? He has simply the satisfaction of having his lot confiscated by the public.

It is suggested in the argument of the corporation counsel (Mr. Adams) that the common council, in and by the act of ordering the improvement, "make an estimate that the benefits to the property assessed will be equal to the cost of the contemplated improvement."

The assessment of injuries and benefits is in the nature of a judicial proceeding, and must be surrounded with some sort of judicial sanction. Besides, the "just compensation" required by the constitution is a matter of substance and not of form, and which this whole proceeding utterly ignores.

It is apparent to all who read it, that our constitution is very stringent in regard to equal taxation, whether general or local. *Take away the assessment of in- [278*] juries and benefits, then special assessments become the same thing in substance as taxes. This will not be denied. Why then should not the same principles apply? But the

constitution, while fixing the rule in regard to taxation, is silent in regard to special assessments. Why was this, since they were well known means, at the time of the adoption of the constitution, of local improvements? Undoubtedly, it seems to us, because its framers regarded them as a proceeding under the right of eminent domain, and the property of the citizen as sufficiently protected under the clause requiring "just compensation." As already stated, this compensation may be made by "benefits," but, when these are exhausted, it then becomes a question of taxation, and the principles of equality and uniformity must apply.

The decisions of other courts, which were cited by plaintiff's counsel proceed, as we have said, upon their own constitutional provisions, and so far as they have application to this case under the peculiar provisions of section 5 of article 9, fortify the view we have endeavored to present. At any rate, even if we should seem to differ from them, we must construe our own constitution, and test the acts of all departments of the goverment, or other authority claiming to be based on its provisions, by it and by it alone.

We regard it as a very plain case, and the section of the charter in question as not in harmony with the sections of the constitution cited.

We have not commented on the cases cited by plaintiffs in error to be found in *Mayor and Aldermen v. Mayberry*, 6 Humph., 368, and *Washington v. The Mayor and Aldermen of Nashville*, 1 Swanst., 177, for the reason that both these cases are assigned, whether properly or not we do not say, to a power different from the taxing power. The ordinance called in question was an ordinance requiring each owner of a lot to construct a pavement in front of it, and in default thereof, directing the constable to construct the pavement, and to collect the cost of the same from the owners. This was held constitutional and valid, the court deciding that [279*] the ordi*nance did not levy a tax. It only required a duty to be performed for the well being and comfort of the citizens of the town, and was in the nature of a nuisance

to be removed. The case in 1 Swanst. is based upon this case.

Other points and authorities have been brought to our notice by the counsel on both sides, which we deem unnecessary to be particularly noticed, the point decided covering the one important ground of controversy. We consider that both the exercise of the right of eminent domain and the power of taxation are limited under our constitution, and the rule with us is deduced, not from general principles, but from the constitution itself, that there does not exist, either in the legislature or in any of the subdivisions of state sovereignty, a power of apportioning taxes, whether of a general or of a local character, except on the principle of equality and uniformity. It is manifest to us that our constitution established equality and uniformity to be the principle of taxation throughout the state in all its subdivisions of local government.

The power of taxation is a power of all others most liable to abuse. It was the object of the framers of our constitution to guard against that abuse, and while all the persons and property within the limits of a city, for which a local government is established, may be subjected to taxation by the delegated authority of such government for purposes of public utility within those limits, the principle of equality and uniformity required by the constitution must be preserved in the apportionment of such taxation, whatever be the objects on which the tax is to operate. *Municipality No. 2 v. White*, 9 La. An., 451.

It may then be asked, how can desirable improvements be lawfully made through the agency of special assessments? It will be observed that sec. 5 of art. 9 does not, in terms, authorize a special assessment for corporate purposes, but only to assess and collect taxes for such purposes. A corporate purpose being ascertained and determined on by the city authorities, the principle should be adopted in order to carry it out, equally required by the constitution and demanded by the *merest justice. Assess to each lot the special [280*] benefits it will derive from the improvement, charging

such benefits upon the lots, and the residue of the costs be paid by equal and uniform taxation.

We omitted to notice in its proper place the proposition of the plaintiffs in error, that our constitution, not being a grant of power to the legislature, but a limitation of the law-making power, is to be construed strictly in favor of the legislature. Besides the authorities cited on this point, this court, in the case of *The People, etc., v. The Auditor*, 30 Ill., 438, said, in a doubtful case, the doubt is usually solved, and should be, in favor of the legislative power.

Another proposition is also stated by them, that it was competent for the legislature to establish this mode of providing means for improving the streets, unless that mode is prohibited by the constitution.

The general principle is doubtless true, that a state legislature may do anything not inhibited by the constitution; but from this their corollary does not necessarily follow, for the reason, although a particular mode of assessment may not be prohibited, yet, at the same time, the mode adopted must not be repugnant to the general provisions of the constitution defining the taxing power, the purposes for which taxes may be assessed, and mode of levying them. The mode prescribed, whatever it may be, must be subject to the restrictions and limitations of the constitution. *Clarke v. The City of Rochester*, 24 Barb., 446.

We have examined with much care the case of *Burnett v. The Mayor, etc., of the City of Sacramento*, 12 Cal., 76, and also the case of *Woodbridge v. The City of Detroit*, 8 Mich., 274, which are much relied on by the plaintiffs in error. In the case last named, the court was divided in opinion, two of the judges holding such assessments as we are considering, to be authoized by the constitution of the state of Michigan, the other two holding they were not so authorized. There is no provision in the constitution of Michigan like the fifth section of article nine of our constitution. "Taxes for purely

[281*] *local public improvements, generally called assessments, are not mentioned in the constitution," says

Mr. Justice MANNING, and, therefore, "the power to impose and collect such taxes, like all other legislative powers not mentioned in the constitution, is plenary, and, in the exercise of it, is subject to legislative discretion only."

What would be a constitutional exercise of power on this subject by the legislature of Michigan might not be by our legislature, by reason of the difference in the provisions of their respective constitutions. The argument of Mr. Justice MANNING, with whom the chief justice concurred, adopts the reasoning of Mr. Justice RUGGLES, 4 Comst., 419, and that is based on the absence of any clause in the constitution of New York, limiting the power of the legislature over the subject.

The case in 12 California was decided on the constitution of that state, which does not contain the provision ours contains, and seems to us, with all the other cases referred to by the counsel for the plaintiffs in error, to be based on wrong assumptions and unsound principles. They all procced on the ground that these assessments are not the exercise of the taxing power, which provides for equality and uniformity in order to raise revenue for the support of the government, but is a power resting in the legislature, to be exercised according to their discretion; and that the improvements to be made by such assessments are such improvements, in which the public is only to a limited extent interested, and therefore the burden of making them should be cast on the parties chiefly benefited in an increased value of their property.

We cannot understand how it is, that a law which places the burden upon the property adjacent to the improvement is a more equitable apportionment than if imposed upon the entire property of the city, ward or district. Nor is it true that the grading, paving, etc., of a street in Chicago, or other large and growing city, is a mere local improvement, the expense of which adjacent proprietors should wholly bear. It is a matter of public benefit, extending throughout the chartered limits of the city. Are not the owners of property on Wabash avenue *and Halsted street, or on the most [282*] remote street in Chicago, and those residing thereon,

benefited by the grading, paving, etc., of Lake, Randolph, or Dearborn, or Clark streets? If so, should they not bear a fair proportion of the expense, to be assessed on the principle of valuation and uniformity, and of benefits? It does not follow, as the case we have put shows, that the owner of an adjacent lot is benefited by an improvement, the cost of which amounts to the full value of his lot, and which may require an additional expenditure by him to make his lot accessible. In these improvements the whole public are interested, and that public should pay the cost, on the principle we have suggested; that is, assess to each lot the special benefits it will derive from the improvement, charging such benefits upon the lots, the residue of the cost to be paid by equal and uniform taxation. In this way the demands of the constitution may be fulfilled, and injustice done to no one.

Entertaining no doubt that this grant of power to the city council is against the fundamental law regulating the subject of taxation, we are compelled, by a sense of our own duty, so to declare, and to hold an assessment for improvements made on the basis of the frontage of the lots upon the street to be improved, invalid, as containing neither the element of equality nor uniformity if assessed under the taxing power; and if in exercise of the right of eminent domain, equally invalid, no compensation whatever being provided or even contemplated by the charter.

The superior court having entertained similar views, their judgment must be affirmed.

Judgment affirmed.

THE CITY OF CHICAGO VS. THE PRESIDENT, DIRECTORS AND COMPANY OF THE HOME BANK et al. [283]

BREESE, J. This case is in all respects identical in principle with the case of *The City of Chicago v. E. C. Larned et al., ante*, and must be decided in the same way. The judgment of the superior court is, for the reasons given in the opinion in that case, affirmed.

Judgment affirmed.

DAVID ROOT VS. THEODORE WOOD.

SALES: *No defense to action for purchase money, that vendor's title was void as to creditors.*

In an action to recover the price of goods sold and delivered, the fact that the plaintiff came by the property under circumstances which would render his title invalid as against the creditors of his vendor, who claimed to act as agent for the plaintiff in making the sale of the property to defendant, constitutes no defense.

WITNESSES: *Impeachment of.*

In order to lay the foundation for impeaching testimony by showing that the witness has made contradictory statements, he should first be asked if he made the statement which it is proposed to prove that he did make, and his attention should be called to the time when and place where these statements were made.[1]

APPEAL from the Common Pleas of the City of *Aurora*.

The case is sufficiently stated in the opinion of the court.

Plato & Smith, for appellant. *Leland & Blanchard*, for appellee.

BECKWITH, J. *This is an action of assumpsit, [286*]

[1] See Northwestern R'y Co. *v.* Hack, 66 Ill., 238; Gotloff *v.* Henry, 14 id., 384; Miner *v.* Phillips, 42 id., 123; Winslow *v.* Newlan, 45 id., 145; Northern Line Packet Co. *v.* Binninger, 70 id., 571; McCoy *v.* The People, 71 id., 111.

brought to recover the price of seven head of cattle and four promissory notes sold and delivered by the appellee to the appellant. The plea is the general issue. On the trial it appeared that the property mentioned was sold to the appellant as the property of the appellee by his father, Samuel Wood, who claimed to be an agent for that purpose. Samuel Wood testified that he had, before the sale, transferred the property to the appellee. The appellant offered evidence tending to show that the transfer by Samuel Wood to the appellee was not *bona fide*, which evidence was excluded by the court. We are of the opinion that the evidence offered did not tend to prove the issue on the part of the appellant. Evidence that the appellee came by the property under circumstances which would render his title invalid, as against the creditors of Samuel Wood, had no direct tendency to establish that the appellant did not purchase the property of the appellee and promise to pay him for it, and no proper foundation was laid for introducing the testimony for the purpose of impeaching the witness Wood. To have made the evidence admissible for the latter purpose, the witness Wood should have been asked if he made the statements which it was proposed to prove that he did make, and his attention should have been called to the time when and place where these statements were made. The judgment of the court below is affirmed.

Judgment affirmed.

Nicholas Marc vs. Herman Kupfer.

Pleading: *A demurrer construed to apply to another plea than the one to which it professed to be interposed.*

Where the record recited that a replication was filed to the third plea, and also a demurrer to the same plea, which demurrer in the transcript of the record followed the replication; and the judgment of the court was that the demurrer be sustained to the second plea, as to which it was obvious that it was in substance interposed: *Held*, that the second plea not being otherwise answered, it was fair to presume the demurrer was understood by the parties and the court to apply to

the second plea, otherwise the judgment would not have been rendered upon that plea.

CURRENT FUNDS: *Check for, cannot be paid by depreciated bank notes.*

The holder of a draft or check for "current funds" may demand in payment current money, par funds, or money circulating without any discount; and can not be compelled to receive depreciated bank notes.[1]

SAME: *Meaning of term can not be contradicted or explained.*

The term "current funds" has a specific legal and well-known meaning that cannot be contradicted or explained.

A plea, therefore, that the term "current funds" in a draft, had a local meaning at the place where the draft was payable, and was understood there and throughout the state to mean such bank notes of the banks in Illinois, as were then in circulation, and which were then greatly below par, fluctuating in value from day to day, which was known to and understood by the parties; wherefore the instrument was not payable in lawful funds, was held bad on demurrer.

BILLS OF EXCHANGE: *What a sufficient demand of payment.*

Where payment of a draft on a firm in Chicago, calling for "funds current to-day," was demanded in such bank notes as were received as current by the Merchants' Savings, Loan and Trust Company of Chicago, which was refused, but payment offered in depreciated Illinois bank notes: *Held*, that the demand of payment was sufficient.

APPEAL from Circuit Court of *La Salle* County.

Assumpsit by appellee, as indorsee, against appellant, as drawer, of the following bill of exchange:

"PERU, ILL., *May 16, 1861.*

"At sight of this my first of exchange (second unpaid), pay to the order of R. G. Parks, Esq., $305.21, in funds current to-day, value received, and charge to account of

"NICL. MARC.

"HOFFMAN & GELPCKE, Chicago, Ill."

The pleadings are sufficiently stated in the opinion of the court.

It appeared upon the trial that on May 22, 1861, the bill was presented to the drawee by a notary, and payment de-

[1] See Webster *v.* Pierce, 35 Ill., 159; Lawrence *v.* Schmidt, id., 440; Townsend *v.* The People, 3 Scam., 328; Springfield M. & F. Ins. Co. *v.* Tincher, 30 Ill., 339; Osgood *v.* McConnell, 32 id., 74.

manded (in accordance with the plaintiff's instructions) in such bank notes as the Merchants' Savings, Loan and Trust Company received as current; and (payment being refused except in depreciated Illinois bank notes worth in coin from the 16th of May until said presentation only about seventy or seventy-five per cent of their face), protest was made on the day of presentation. It also appeared that such Illinois bank notes were, on the 16th of May, 1861, received by the majority of the Chicago banks as current; and, although not a circulating medium after May 18th, the banks received them till about the 26th, though they were deemed worth only the sum above stated.

The judgment in the court below was for the plaintiff.

It was insisted on behalf of the appellant, that the judgment was erroneous, among other reasons, because there was no issue joined upon the second plea, and because the court rendered judgment against the defendant upon demurrer to the second plea, when in fact it was the third plea that was demurred to, the second plea not being answered in any manner; because there was no sufficient demand of payment which it was insisted should have been unconditional for payment in money; because there was no legal evidence of due protest of said bill and due notice of protest to the drawer. It was also insisted that the words "funds current to-day" might be shown to have a local signification and to mean depreciated Illinois bank notes, and not the legal currency of the nation.

G. S. Eldridge, for appellant. *Leland & Blanchard*, for appellee.

[292*] *Walker, C. J. The record recites, that a replication was filed to the third plea, and also a demurrer to the same plea, and the judgment of the court was that the demurrer be sustained to the second plea. It is obvious that the demurrer was substantially to the second plea. It is true that the demurrer states that defendant's plea, thirdly above pleaded, is insufficient in law to bar plaintiff's action, embodying the transcript of the record, in following the replication. And the

judgment is upon the sufficiency of the second plea. We are of the opinion, that the second plea not being otherwise answered, it is fair to presume the demurrer was understood by the parties and the court to apply to the second plea, otherwise the judgment would not have been rendered upon that plea.

The question then arises whether the plea presented a defense to the action. The draft was drawn at sight, for three hundred and five dollars and twenty-one cents, in funds current on the day of its date, for value received. The plea set up as a defense, that the term "current funds" had a local meaning at the place where the draft was payable, and was understood, there and throughout this state, to mean such bank notes, of the banks in Illinois, as were then in circulation, and which were then greatly below par, or their nominal value, fluctuating in value from day to day, which was known to, and understood, by the parties, wherefore the instrument was not payable in lawful funds. It has been repeatedly held by this court, and is regarded as the settled doctrine, that the terms "currency" and "current funds" have a specific, legal and well known meaning, that cannot be contradicted or explained.

In the case of the *Galena Ins. Co. v. Kupfer*, 28 Ill., 332, it was held, that on a check for current funds, the holder might demand in payment, current money, par funds, or money circulating without any discount. This check called for par funds, and it could not be paid by depreciated bank paper.

In that case it was also held, that the term "current funds" had a well defined, specific meaning, well understood by all classes of business men. And that extrinsic evidence could not be received to alter, change, or in anywise vary its meaning. *That case is in point, and is conclusive of [293*] this question. The court below, therefore, committed no error in sustaining the demurrer to this plea. The demand of payment of the draft was sufficient, and the notice of non-payment was good to bind the drawer in an action for the recovery of the amount of the draft.

The judgment of the court below must be affirmed.

Judgment affirmed.

The Board of Supervisors of Iroquois County et al. vs. William F. Keady et al.

Removal of County Seats: *Law authorizing an election.*

Section 5 of article 7 of the constitution of 1848, providing that "no county seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county shall have voted in favor of its removal to such point," contemplates the passage of a law authorizing an election to be held, and prescribing the time when, and the place where it shall take place; the manner in which it shall be conducted and its results made known. Without such a law the proceedings at the election would be those of an unauthorized assemblage.

Statutes: *When they take effect: emergency clause.*

In order to take an act out of the constitutional provision (sec. 23, art. 3, Const., 1848) that "no public act of the general assembly shall take effect or be in force until the expiration of sixty days from the end of the session at which the same may be passed, unless in case of emergency the general assembly shall otherwise direct," the legislature must direct that the act as a whole and entirety shall take effect at a different time; and it is not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period. The direction must be made in a clear, distinct, and unequivocal provision, and cannot be helped out by any sort of intendment or implication.

Same: *Same.*

Where, therefore, an act to authorize an election for the removal of a county seat directed an election to be held on a day prior to the termination of the session, and the election was so held; but the act contained no emergency clause: *Held*, that this was not a compliance with the said constitutional provision; that the act had not taken effect when the election was held; and, therefore, that the election was unauthorized.

Parties in Chancery: *Complainants in bill to restrain removal of county seat.*

As to whether an injunction bill filed by citizens of the county against the board of supervisors to restrain the removal of the county seat is the proper mode of bringing the question before the court, *quære.*

An act of administration likely to produce taxation is not, ordinarily, a matter of private or individual concern, but an affair altogether public, and the appropriate remedial process against an abuse of administrative power tending to taxation, would seem to be a proceeding in behalf of the state.

Appeal from Circuit Court of *Iroquois* County.

Bill in equity filed by Wm. F. Keady, Cyrus B. Barnes and Louis Throup, citizens of Iroquois county, against the board of supervisors of said county, to restrain the removal of the county seat of said county in accordance with the result of an election resulting in favor thereof, held March 17, 1863.

The court below decreed that such removal be perpetually injoined.

Randall & Fuller, *Leland & Blanchard*, and *Roff & Doyle*, for appellants. *Chester Kinney* and *James Fletcher*, for appellees.

Beckwith, J. The fifth section of article seven of [294] the constitution provides that "no county seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county shall have voted in favor of its removal to such point."

This provision of the constitution contemplates the passage of a law authorizing an election to be held, and prescribing the time when, and the place where it shall take place; the manner in which it shall be conducted and its results made known. Without such a law there would be no time for holding it, no places for receiving votes, no persons authorized to receive them, and no mode of making the result known; the proceedings would be those of an unauthorized assemblage.

Before the passage of the act of February 11, 1863,[1] there was no law authorizing such an election to be held by the voters of Iroquois county. An election was held on the 17th day *of March, 1863, and if the act mentioned [295*] had not then become a law, it is eveident that no such

[1] "To enable the people of Iroquois county to vote for the removal of the county seat."

vote has been given in favor of the removal of the county seat, as the constitution requires.

Section twenty-three of article three of the constitution declares, "and no public act of the general assembly shall take effect or be in force until the expiration of sixty days from the end of the session at which the same may be passed, unless in case of emergency the general assembly shall otherwise direct." The session of the general assembly which passed the act referred to had not terminated when the election was held, and the act could not become a law until the expiration of sixty days from the end of the session, without an express direction of the legislature to that effect. Inasmuch as the act directs an election to be held on the 17th day of March, 1863, it is insisted that it must be deemed a direction of the legislature that the provision which authorizes an election should take effect on or before the time when the election was to be held. The same rule of construction would imply directions, that the provisions which require notice to be given should take effect at least twenty days before the time when the election was to be held; that the provisions which fix the place to which the removal was proposed to be made, should take effect before votes were cast in favor of the removal; that the provisions which prescribe the manner in which the votes shall be counted and the result made known should take effect immediately after the election; that the provisions which require the board of supervisors to procure or erect suitable public buildings for the public offices of the county, and for holding the county and circuit courts of the same, should take effect as soon as the result of the election was known; and that the provisions which require the records and offices of the county to be removed to the place in favor of which a majority of the voter should vote, and the county and circuit courts to be held at such place, should take effect when the necessary arrangements were made.

The court is not aware of any rule by which an act of the legislature, regulating the rights and duties of citizens, [296*] becomes *a law, piece-meal upon the performance of

acts *in pais*, known only to a limited number of persons, for the purpose of subserving the exigencies of the inhabitants of a particular locality.

In *Wheeler v. Chubbuck*, 16 Ill., 361, it was held, that "in order to take an act out of the constitutional provision, the legislature must direct that the act as a whole and entirety shall take effect at a different time, and that it was not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period." The court on that occasion said, that "the direction must be made in a clear, distinct and unequivocal provision, and could not be helped out by any sort of intendment or implication." The object of the constitutional provision was to enable those who were to be governed or affected by a law, to become informed of its provisions; and it has been uniformly construed by the legislature as construed by this court. This construction commends itself to our judgment, and we are unable to perceive any reason for relaxing a rule so well settled. As the act of February 11, 1863, had not become a law when the election was held under it, there was no point fixed by any law then in force to which it was proposed to make the removal, and the voters did not cast their votes in favor of a removal to any point fixed by law.

In disposing of the main point in controversy, the court desires to be understood as not expressing any opinion as to the mode in which the question is brought before us. If the complainants had taxable property at the time they commenced their suit, they may not have had any when the next assessment for the purposes of taxation was made; and if they had none when the acts complained of were about to be committed, they might have been large tax payers when those acts would produce their result in increased taxation. The liability of the complainants to injury consisted in their belonging to a community in which every person was subject to pay taxes of all he possessed. An act of administration likely to produce taxation, is not, ordinarily, a matter of private or individual concern; it is an affair altogether

[297*] public, and the appro*priate remedial process against an abuse of administrative power, tending to taxation, would seem to be a proceeding in behalf of the state. *Roosevelt v. Draper*, 23 N. Y. 318; *Doolittle v. Supervisors of Broome County*, 18 id., 155; *Davis v. The Mayor of New York*, 2 Duer, 663. in which the English cases are cited.

From an expression in the opinion of the court in *The People ex rel. Mitchell v. Warfield*, 20 Ill., 159, it has been supposed that a suit like the present one might be maintained. The court in that case refused to award a mandamus requiring the defendant to do an act which he was restrained from doing by an injunction issued by the circuit court in a suit in which no question was made in regard to who were proper parties.

We consider the question as undetermined in this state, and as the plaintiffs in error have waived its consideration, we are not required to reverse the judgment on that ground alone

The decree of the court below is, therefore, affirmed.

Decree affirmed.

HENRY S. HINER vs. THE PEOPLE OF THE STATE OF ILLINOIS.

INDICTMENT: *Conviction on a general verdict will be referred to the good counts.*[1]

A conviction on a general verdict will not be questioned, although some of the counts are faulty, if there be one good count in the indictment. It will be presumed, unless the contrary appears, that the conviction was under the good and not under the faulty counts.

PUBLIC HIGHWAY: *Effect of survey and plat as evidence.*

The survey and plat of a public road made and returned by the highway commissioners, when they located it, is legitimate evidence as to the location of the road, but is not conclusive as to where the place or precise line may be found, but is open to correction by parol evidence. Like the field notes of the government surveys, they always control, unless it is made to appear that lines and corners are different from

[1] Curtis *v.* The People, Breese, 256; Halliday *v.* The People, 4 Gilm., 111.

the calls of the field notes. When the original line or corner is found, and it conflicts with the calls of the field notes, the former must govern.

New Trial: *Verdict against the evidence.*[1]

Where the evidence is conflicting, it is the province of the jury carefully to consider the whole evidence; and their verdict in such case will not be set aside unless manifestly against the weight of the evidence.

Error to Circuit Court of *Stark* County.

Indictment for an obstruction of a public highway, the first and second counts of which charged Hiner with unlawfully, with force and arms, erecting and building a fence, thereby obstructing the public road, and then and there by said fence and said obstruction rendering the said public road inconvenient to pass; and the third count of which charged him with unlawfully, with force and arms, erecting and building a fence, thereby then and there obstructing the said public road; and with, from the sixteenth day of August A. D. 1861, continuing said obstruction in and across said public road until the day of finding the indictment, thereby during all that time rendering the said public road inconvenient to pass.

The following instructions were given for the people, to the giving of which the defendant excepted.

(4) "The monuments or corner run to by the surveyor in surveying the road, and the staking and laying out of the road, must always control in determining the location of the road; and the field notes and plat returned by the surveyor are but matter of description which serve to assist in determining the place where the road was actually located.

(5) "In determining the boundaries of land in this state, the original mounds or monuments must govern as to the location of the line, although the line may, by following such original mounds, be made a crooked or deflected line. And if the original mounds have once been discovered and recognized by a county surveyor as original corners, a county surveyor who might be subsequently elected would have no right to

[1] See Chicago & R. I. R. R. Co. *v.* Hutchins, *ante*, 108.

disregard such original corners and establish a different line, though such a line might be a straight one.

(6) "If the jury believe from the evidence, that Berfield actually surveyed and located the road on the deflected line, under proper authority, that would be the true line of the road, although the true section line might be south of that. The actual survey and staking and viewing of the road, upon the ground where it is laid, constitute the location, and the markings and lines made by the surveyor and viewers upon the plat, do not constitute the location of the road, provided the road was actually opened upon that line."

(5) The defendant requested the court to give the following instruction, which was refused in the form asked, but given with the qualification indicated by italics, to which qualification defendant excepted.

"Though the viewers and surveyors may in fact have traveled or run upon a deflected line over the defendant's land, yet if they did not mark the route by stakes, monuments or other visible signs, showing where they laid the road, and in their report and survey they state they viewed and located the road according to the plat and survey, then the plat and survey will show the true route and location of said road. The report of road viewers, plat, surveys and field notes of the surveyor in viewing and locating roads, at the time the road in controversy was alleged to have been laid out, were required by law to be returned into the office of the clerk of the county commissioners' court; and they thereby became a part of the public records of the county, for the use of the public. And all such reports, plats and surveys, and other records relating to the road in controversy, as have been used in evidence in the case, are proper evidence of the facts stated in them, and cannot be contradicted or destroyed by verbal evidence of witnesses; nor can the same be explained except there is doubt or uncertainty as to the meaning of the language of the same, or omissions therein. And the jury are instructed to disregard all evidence which is in conflict with the record evidence admitted in this case.

"*This instruction is given as qualified by the instructions given for the prosecution, in reference to the question of actual location of the road.*"

The trial below resulted in a verdict of guilty, upon which judgment was rendered.

Puterbaugh & Ingersoll, for plaintiff in error. *M. Shallenberger*, for defendant in error.

WALKER, C. J. No objection is perceived to the [304] first and second counts of the indictment. Even if the third is defective, which we deem unnecessary to determine, the good counts will support the judgment. The rule is of uniform application, that a conviction on a general verdict will be sustained, although some of the counts are faulty, if there be one good count in the indictment. The first and second counts being good, they will sustain this general verdict and the judgment of conviction. We must presume, unless the contrary appears, that the conviction was under the good, and not under faulty counts.

The principal question, however, in this case, relates to the location of the road in controversy. The dispute seems to be, where the road was actually located. The plat of the road calls for the line, dividing the government lands, as made by its surveyors. The plat made and returned by the commissioners, when they located it, is unquestionably legitimate evidence, but is not conclusive as to where the place or precise line may be found. Like the field notes of the government surveys, they always control, unless it is made to appear that lines and corners are different from the calls of the field notes.

When the original line or corner is found, and it conflicts with the calls of the field notes, the former must govern. The survey, as it was actually made, is the thing, and the field notes are designed to describe and represent it, and a misdescription of the actual survey as made cannot alter or change the survey itself. In the absence of evidence to show that the *lines and corners were actually placed differ- [305*] ently from the calls in the notes, they must govern.

So with the map or plat returned by the commissioners. The field notes describe the lands surveyed, and the plat describes the ground appropriated for public use, and the design of both is to find the particular tract or strip of land, when further occasion shall require. Nor does this plat differ from the notes of the survey of any other tract of land.

The issue before the jury for trial was, whether appellant had obstructed a public highway. And to determine that fact, it was necessary to find the precise line or place where the commissioners actually located the road, and then determine whether the obstruction was on the ground over which it was located. It is not disputed that a road was located near the place claimed; but it was denied that it was on the line of the road. On this question many witnesses were examined, the plat of the road was introduced, and other surveys were referred to by witnesses; and, as might be supposed, this evidence does not all harmonize. It was, therefore, the province of the jury to carefully consider the whole evidence, and determine where the road was located, and determine whether it was obstructed as located. After a careful examination, we are of the opinion that the evidence warrants the conclusion at which the jury have arrived. At any rate, the finding is not so manifestly against the weight of evidence as to require us to disturb the verdict. Nor do we we perceive any objection to the instructions given, or error in the modifications made before they were given. The judgment of the court is therefore affirmed.

Judgment affirmed.

Frederick H. Manny and Jesse Blinn, for use of [306]
F. H. Manny, vs. Charles L. Stockton.

Usury: *Once paid, cannot be recovered back.*

Since the passage of the act of 1857 (Scates' Comp., 600), an action does not lie for the recovery back of money paid as usurious interest.[1]

Evidence: *Ex parte affidavits inadmissible.*

The *ex parte* affidavit of a third person, if objected to, is inadmissible as evidence, and amounts to no more than hearsay.

Appeal from Circuit Court of *Winnebago* County.

Assumpsit by appellants against appellee.

The case is sufficiently stated in the opinion.

L. F. Warner, for appellants. *Brown & Taylor*, for appellee.

Breese, J. As we understand this case, as pre- [312]
sented by the record, it is nothing more nor less than an attempt to recover back money paid as usurious interest on a promissory note. The note was made in 1859.

This court decided, since the passage of the act of 1857 (Scates' Comp., 600), that it was manifest the legislature had no intention to give a cause of action to the person who has paid usury and fails to make the defense when sued for the debt upon which usury has been paid or agreed to be paid, and if a party voluntarily pays the principal sum due and the usury agreed to be paid on it, that is the end of the matter so far as this statute is concerned. It was manifest it was the intention of the legislature to furnish a shield for defense, not a weapon for attack, by the passage of this act. *Hadden v. Innis*, 24 Ill., 381; *Tompkins v. Hill*, 28 id., 519.

In *Perkins v. Conant*, 28 id., 185, we held the same rule applied to involuntary payments or forced collections.

There was no error in excluding the affidavit of Marshall. It was not evidence in the cause, was *ex parte*, and amounted to no more than hearsay evidence.

[1] See Ramsey *v.* Perley, *post*, 504.

There being no error in the record, the judgment is affirmed. Judgment affirmed.

[313*] *Daniel A. Jones and Charles M. Culbertson vs. The Council Bluffs Branch of the State Bank of Iowa.

Bills of Exchange: *What amounts to an acceptance.*

A promise by the drawee to pay an existing bill is an acceptance, or, in law, amounts to an acceptance, whether the bill was taken upon the faith of the promise or not. A promise to any person interested in having a bill paid inures to the benefit of the holder.[1]

Same: *Failure of consideration of promise to accept.*

Where the drawer of a bill transferred to the drawee all his interest in certain property, in consideration of the drawee's undertaking to pay the bill in question, the drawer agreeing that the net proceeds of such property should amount to a certain sum: *Held*, that, the agreements not being intended to be dependent on each other (the agreement to accept being for the benefit of the holder), the failure of the proceeds of said property to amount to the sum stipulated furnished no excuse for not accepting and paying the bill.

Error: *Working no injury, not ground for reversal.*[2]

Even if a demurrer to some of the defendant's special pleas has been improperly sustained, the supreme court will not reverse the judgment where the defendant has had the full benefit of his defense set up in said pleas, under the general issue.

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[1] See Mason *v.* Dousay, 35 Ill., 424; Phelps *v.* Northup, 56 id., 156; Sturges *v.* Fourth National Bank, 75 id., 595.

[2] See Reynolds *v.* Palmer, 70 Ill., 288; Zepp *v.* Hager, id., 223; Murray *v.* Haverty, id., 318; Andes Ins. Co. *v.* Fish, 71 id., 620; Beseler *v.* Stephani, id., 409; Lovenguth *v.* City of Bloomington, id., 238; Toledo, W. & W. Railway Co. *v.* Corn, id., 493; Peoria, A. & D. R. R. Co. *v.* Sawyer, id., 361; Carpenter *v.* Davis, id., 395; Walden *v.* Lewis, id., 453; Atkins *v.* Byrnes, id., 326; New Eng. F. Ins. Co. *v.* Wetmore, 32 id., 221; Lawrence *v* Jarvis, id., 304; Parker *v.* Fisher, 39 id., 164; Potter *v.* Potter, 41 id., 80; Watson *v.* Wolverton, id., 242; Curtis *v.* Sage, 35 id., 22; Root *v.* Curtis, 38 id., 192; Coursen *v.* Ely, 37 id., 338; Boynton *v.* Holmes, 38 id., 192; Clark *v.* Pageter, 45 id., 185; Rankin *v.* Taylor, 49 id., 451; Pahlman *v.* King, 49 id., 266; Peoria Ins. Co. *v.* Frost, 37 id., 333; Jarrard *v.* Harper, 42 id., 457; McConnel *v.* Kibbe, 33 id., 174; Lettick *v.* Honnold, 63 id., 335; Stobie *v.*

APPEAL from Superior Court of *Chicago*.

The case is sufficiently stated in the opinion.

Arrington & Dent, for appellants. *Walker & Dexter*, for appellees.

BECKWITH, J. This is an action of assumpsit to [319] recover the sum of money mentioned in a draft dated July 16, 1861, drawn by Green & Stone on the appellants, alleged to have been verbally accepted by them, but protested for nonacceptance. The defense was, that the promise of the appellants to accept did not constitute an acceptance; that such promise was obtained by fraud, and that its consideration had failed. On the trial, the plaintiffs offered in evidence the draft and a written agreement of Green & Stone, dated August 1, 1861, by which they transferred to the appellants all their interest in certain property and claims for commissions, in consideration of the appellants undertaking to pay the draft in question. The plaintiffs also offered evidence tending to prove that the appellants promised Green & Stone that they would accept and pay the draft, and that the appellees, after they had taken it, were informed of this undertaking. A promise by the drawee to pay an existing bill is an acceptance, or, in law, amounts to an acceptance, whether the bill was taken upon the faith of the promise or not. A promise to any person interested in having a bill paid inures to the benefit of the holder. These principles were settled in the time of Lord ELLENBOROUGH, and a reference to any of the text books will furnish the names of a great number of cases in which they have been acted upon in England and in this country. They are too well settled to be discussed at the present day. The court below found there was no fraud in

Dills, 62 id., 432; Toledo, P. & W. R'y Co. *v.* Ingraham, 58 id., 120; Hardy *v.* Keeler, 56 id., 152; Graves *v.* Shoefelt, 60 id., 462; Daily *v.* Daily, 64 id., 329; Chicago, B. & Q. R. R. Co. *v.* Dickson, 63 id., 151; Schwarz *v.* Schwarz, 26 id., 81; Hall *v.* Sroufe, 52 id., 421; Strohm *v.* Hayes, 70 id., 41; Ryan *v.* Donnelly, 71 id., 100; Cooke *v.* Preble, 80 id., 381; Reynolds *v.* Greenbaum, id., 416; Berdell *v.* Berdell, id., 604; Stevison *v.* Earnest, id., 513.

obtaining the promise, and we are entirely satisfied with its finding. The appellants' agreement to accept the bill was for the benefit of its holders; and the agreement of Green and Jones that the net proceeds of the property and the commissions transferred to the appellants should amount to a certain sum was solely for their benefit. The nonperformance of the latter agreement furnishes no excuse for not accepting and paying the bill. The agreements were not intended to be dependent on each other. The undertaking on the part of the appellants was, that they would pay the bills when they became due. They were to convert the property transferred to them into money at the best price they could obtain [320*] for it, and ascertain the amount of the *commissions; and if these sums did not amount to sufficient to pay the bills which they undertook to pay, Green and Jones undertook to pay them the difference. Such was the legal effect of their agreement. We do not deem it necessary to make a critical examination of the special pleas filed by the appellants. All the matters set up in them were admissible in evidence under the general issue, and on the trial were given in evidence under it. The appellants have had all the benefit which they can derive from the facts; and if the demurrer to some of the pleas was improperly sustained, we should not reverse the judgment after the appellants have had the full benefit of their defense under the general issue. *Atlantic Ins. Co. v. Wright*, 22 Ill., 462.

Perceiving no error in the record, the judgment of the court below will be affirmed.

Judgment affirmed.

Henry R. Green, Joseph A. Patterson, John Holmes and John Snedecker vs. Nathaniel W. Green.

Highways: *Vacation by failure to open within five years.*

Under section 17 of the statute (Sess. Laws, 1854, 27; Scates' Comp., 364), regulating township organization and declaring that, unless a public road laid out by order of the commissioners of highways shall be opened within five years, the same shall become vacated, such non-user for the limited period operates as an abandonment, and remits the owners of the land which had been condemned for the use of the public, to their former rights in the property.[1]

Same: *Same.*

And whether the right of way has been obtained by release or by condemnation or payment of damages, the right of the owner to resume the exclusive use and occupancy of the land is complete and unqualified after such abandonment.

Same: *To avoid vacation the entire length must be opened.*

Where the road petitioned for, surveyed and established, is an entirety, to avoid the vacation of the road, it must be opened its entire length within five years from the time of its location. That effect cannot be avoided by opening portions within the time.

Injunction: *To restrain opening of road which would produce irreparable injury.*

Where a road was located across a township on the 27th day of June, 1857, and on the 26th of June, 1862, the commissioners of highways proposed to open that portion passing through complainant's farm, then inclosed and under cultivation; and it would have been impossible to open the whole road before the expiration of the five years prescribed by the statute: *Held*, that, as to permit the commissioners to proceed would result in no benefit to the public, as the day after the opening of the road the complainant might rightfully close it up, and prevent travel over that portion crossing his land; and as, if opened, although injurious to complainant, it would be done under color of law so that the commissioners could justify the act in an action for damages, the case came within the rule that equity will restrain an act which, if performed, would produce irreparable wrong and injury, and that the opening of the road would be perpetually injoined.

The fact that in such case the complainant, in consideration of obtaining the road as located across the township, released the right of way

[1] As to what is a sufficient opening, see Wiley *v.* Town of Brimfield, 59 Ill., 306.

for the road over his premises, will not estop him from objecting to its being opened, as, having failed to obtain the road, it would be unjust to hold the right under the release, and yet deprive him of the consideration that induced the release.

ERROR to Circuit Court of *Tazewell* County.

Bill in equity filed by defendant in error against the three first named plaintiffs in error, as commissioners of highways, and the last named, as overseer of highways, to injoin the opening of a public road across the farm of defendant in error.

The case is sufficiently stated in the opinion.

Bangs, Shaw & Bergen, for plaintiffs in error. *Cooper & Moss*, for defendant in error.

[325*] *WALKER, C. J. The statute regulating township organization has declared that unless a public road, surveyed and located by the town authorities, shall be opened within five years, the same shall become vacated. Scates' Comp., 364, § 17. Such nonuser for the limited period operates as an abandonment, and remits the owners of the [326*] land which had been condemned for the use of *the public to their former rights in the property. And whether the right of way has been obtained by release or by condemnation or payment of damages, the right of the owner to resume the exclusive use and occupancy of the land is complete and unqualified after such abandonment. Had the full period of five years expired after this road was located without its being opened, there could be no question of the right of defendant in error to prevent the opening of the road through his premises.

The bill alleges, and the fact is admitted by the demurrer, that the road was located across the township on the 27th day of June, 1857, and the commissioners proposed to open that portion passing through the premises of defendant in error at the date of suing out the writ of injunction, which was on the 26th of June, 1862. The bill alleges that the land through which the road was located, for its whole length west of de-

fendant in error, was inclosed and in cultivation,[1] and the right of way had not been procured by release from the owners or by payment of the damages assessed for the purpose, nor had the means been provided for their payment, and that it was impracticable within the five years to pay the damages and open the road, as notices had not been given to the owners. It was also claimed that the road had thereby been abandoned, and the commissioners and those acting under them would become trespassers, by entering upon the premises of defendant in error and opening that portion of the road. The allegations of the bill, which must be taken as true, show that the purposes which had induced the location of the road had ceased to operate. The road petitioned for, surveyed and established, was an entirety. These acts were all performed to create an entire road, and not to create sections or parts of a road. It was to obtain a thoroughfare on this line for the public across the township, and not across the farm of defendant in error. And to have avoided vacating the road, it should have been opened its entire length within five years from the time of its location. That effect could not be avoided by opening portions within the time. Had all the road except the portions running through these premises been opened, or had it been practicable to open *the whole [327*] road before the expiration of the time, and the commissioners had in good faith been proceeding to that end, it would have sufficed. But this, we have seen, was impossible, and had they proceeded, it would only have resulted in opening the portion running through the premises of defendant in error.

The design in establishing this road would not have been accomplished by opening this portion, as the remainder would have remained unopened after the five years had expired, and the whole road thereby vacated, and defendant in error then could have closed this portion. Thus it will be seen, that to have permitted the commissioners to proceed, would have re-

[1] Complainant's land, through which the road was located, was also inclosed and under cultivation.

sulted in no benefit to the public, as the day after they had opened the road, defendant could have rightfully closed it up and prevented travel over that portion. So the act would have been useless to the public and injurious and expensive to defendant in error. The law never requires the performance of a useless act, and chancery will interpose to restrain its performance when attended with injury to others. In this case, had the commissioners proceeded to open this portion of the road, it would have been done under color of law, and they could have justified the act in an action for damages. This, then, confers jurisdiction upon a court of equity to prevent an injury for which a recovery could not have been had at law; and brings the case within the rule that equity will restrain an act which, if performed, would produce irreparable wrong and injury.

It is, however, urged that defendant in error, having released the right of way for the road over his premises, is now estopped from objecting to its being opened. But the bill alleges, and it is admitted to be true by filing the demurrer, that the consideration moving him to give the release was to obtain the road as located. Having failed to obtain the road, it would at least be unjust to hold that right, and yet deprive him of the consideration that induced the release. It was not given to obtain a passway over his own farm, but to obtain a road across the township from the east to the west line.

[328*] Nor is it any answer to say that it might be extended in the future, so *as to accomplish the original design, by a new proceeding had for the purpose, as no such presumption can be indulged. The law allowing the town authorities five years within which to open new roads is liberal, and affords ample time within which to construct them; and if required for the public convenience, it can hardly be supposed that such a road would remain so long unopened. The authorities having failed for five years, lacking but a single day, to open this road, and then only propose to open a small portion of the line, it would seem that public necessity did not require its construction. If, however, the

wants of the public were found to require only the east and not the west end of the road, the course to have been adopted was to have proceeded under the law, to have that portion vacated, precisely as is required to vacate any other road. But to permit a road to be located its full length, merely to acquire a road for only a part of the distance, would be contrary to the design of the law, if not a fraud upon a portion of the property holders, through whose land it is run, as well as those who petition for its location. If in this case the east half of this road is necessary to accommodate the public, it can be located in the mode prescribed by the statutes. But having abandoned the road by failing to open it within the period limited by the statute, the road has become vacated. The circuit court, therefore, committed no error in overruling the demurrer, and rendering the injunction perpetual, and the decree must affirmed.

Decree affirmed.

Herman Kupfer vs. The Bank of Galena.

Bills of Exchange: *Testimony as to drawer's guarantying payment, immaterial.*

In an action by the payee against the drawer of a bill of exchange, testimony to the point the payee would take the bill only on the responsibility of the drawer, and his alleged promise to guaranty it, is immaterial; for by the very act of drawing, he guaranties its payment, on condition that, having funds in the hands of the drawee, the bill is presented to the drawee, payment refused and he duly notified of the refusal.

Same: *When notice of dishonor is necessary.*

Where the drawer of a bill of exchange has no funds in the hands of the drawee, nor any expectation of any, he is not entitled to notice of the refusal of payment by the drawee.[1]

But if the drawer has reason to expect there are funds in the hands

[1] See Howes *v.* Austin, 35 Ill., 396; Lawrence *v.* Schmidt, id., 440; Brower *v.* Rupert, 24 id., 183; Wood *v.* Price, 46 id., 435.

of his drawee to meet his drafts when he draws them, as where railroad receipts for grain consigned to the drawee are attached to the drafts, of sufficient value to pay them all, he will be entitled to notice of refusal to pay them.

SAME: *Drawer bound by promise to pay made, after dishonor, with notice of the facts.*[2]

Where the drawer of a bill of exchange, with full knowledge of all the facts in relation to the nonacceptance or nonpayment of the bill drawn by him, promises the holder to pay the same, he will be bound by such promise.

SAME: *Promise by drawer to pay, only applies to drafts dishonored, and not to drafts paid but not remitted.*

K. purchased wheat for P., and, by arrangement of the parties, consigned the same to the Bank of Peru, and drew drafts on that bank for the cost of the wheat, payable to the Bank of Galena, which drafts were sent by the Bank of Galena to the Bank of Peru, with instructions to remit, and were paid by P. Running accounts were kept between the two banks, and these drafts were charged against the Bank of Peru, and the account credited by remittances; certain drafts so sent were paid by P. to the Bank of Peru in the mode and manner expected by the Bank of Galena: *Held*, that for the failure of the Bank of Peru to remit the proceeds of such drafts so paid to it by P., the drawer K. could not be held liable as for the dishonor of the bill; and that his subsequent promise to pay his drafts dishonored by the Bank of Peru only embraced such drafts as had not been paid by P., and not the drafts so paid by him to the Bank of Peru.

SAME: *Accompanied by shipping receipt for grain shipped to drawee; payee not obliged to account for proceeds of wheat not consigned to him.*

Where grain is consigned to a bank, and a bill of exchange drawn upon the consignee for its cost in favor of another bank, to which bill the railroad receipts for the wheat are attached, the payee having no control over the wheat, or any power to sell it, in an action against the drawer for the dishonor of his bill, there is no error in refusing an instruction that the plaintiff, the payee, before he can recover, if at all, must account for the value of the wheat.

BANKING; DEPOSITS: *Of gold before passage of legal tender acts; in what payable.*

Where, in 1861, before the passage of the several acts of congress making treasury notes a legal tender, gold coin was deposited in a bank to be drawn out in gold: *Held*, that the bank had no right to make the depositor's checks for currency a charge against his deposit of gold; and that the depositor was entitled, if paid in currency at a

[2] See Tobey *v.* Berley, 26 Ill., 426, promissory note; Strong *v.* King, 35 id., 9; Lawrence *v.* Schmidt, id., 444; Walker *v.* Rogers, 40 id. 278.

discount, to have the amount of that discount allowed him, or, in other words, he was entitled to receive of the bank the premium at which gold was sold over currency for the whole amount deposited, unless he agreed to receive currency as coin.

EVIDENCE: *Affidavit to lay foundation for parol proof of contents of bill of exchange.*

In an action by a bank against the drawer of a bill of exchange, an affidavit by the managing agent of the bank that the bill was sent to the bank upon which it was drawn; that affiant applied to the drawee for it, but was told it was not there, and that the former cashier of the drawee had absconded to Canada and taken it with him or destroyed it; that thorough search was made by the officers of the bank upon which it was drawn, for it among the papers and files of the bank, but that it could not be found, is sufficient to warrant the admission of parol proof of its contents.

APPEAL from Circuit Court of *Jo Daviess* County.

This was an action brought by appellee against appellant on five drafts drawn by appellant on the Bank of Peru and payable to the Bank of Galena, whose president and managing agent was N. Corwith.

The case is sufficiently stated in the opinion of the court.

The verdict and judgment below were for the plaintiff.

L Shissler, *M. Y. Johnson* and *E. S. Leland*, for appellant. *Glover*, *Cook & Campbell*, for appellee.

BREESE, J. Appellant makes these points: First. [350] The drafts having been drawn under this letter of credit, signed by the Bank of Peru, are regarded as accepted drafts, and being accepted drafts, they became the debt of the Bank of Peru, the acceptor being primarily liable. He is regarded in the same light as the maker of a promissory note. It is his debt. He is the party looked to for payment, and being the original debtor and primarily liable, a promise by any other person to pay them is a collateral promise, and must be proved to have been made in writing. In support of this proposition, the following authorities are cited: 2 Story, 213; 4 Mich., 450; 2 McLean, 452; 3 Comst., 203; 2 Carter (Ind.), 408.

This proposition assumes that the drafts were drawn under

the authority of the letter of the Bank of Peru, of the date of June 7, 1860. That authority is to R. G. Parks, or his agent, to draw. The jury have ignored the fact that appellant was the agent of Parks to draw these drafts, for that question was distinctly put to them by the appellee's third instruction. It was this: "In order to entitle the letter of credit referred to in this case to any consideration as evidence, the jury must be satisfied from the proof that the drafts sued on were drawn by the defendant Kupfer, agent of R. G. Parks; and if the jury believe from the evidence that the drafts [351*] were drawn by Hup*fer on his own responsibility, and that he was not the agent of R. G. Parks, then said letter of credit should be disregarded by the jury." The fact is found by the jury that these drafts were not drawn by appellant, as the agent of Parks, on the letter of credit given by the Bank of Peru, consequently they were not accepted drafts by that bank. The Bank of Peru at no time agreed to accept appellant's drafts. It follows, then, that those drafts were like other commercial paper, which, if not paid by the drawee, the drawer must pay. No question of original or collateral undertaking can arise in any such case — no question of guaranty, and no question as to the nature of the guaranty, whether it must be in writing or may be by parol. The testimony, to the point that Corwith would take the drafts only on the responsibility of appellant, and his alleged promise to guaranty them, amount to nothing; for by the very act of drawing he guarantied their payment, and could be called on for payment on certain conditions; that having funds in the hands of the drawee, the drafts were presented to the drawee and payment refused, and he duly notified of the refusal. His liability is then complete. But if he had no funds in the hands of the drawee, nor the expectation of any, he would not be entitled to notice of the refusal of the drawee. And the reason is, having no funds, notice could do him no good; there was nothing in jeopardy which he might save by timely notice.

But the appellant had every reason to expect that there were funds in the hands of his drawee to meet these drafts when he

drew them, as the railroad receipts for the wheat were transmitted at the same time, of value sufficient to pay them all. He was then entitled to notice of the refusal of the Bank of Peru to pay these drafts, and that is all he could claim. He occupied the position of any ordinary drawer of a bill, and nothing better. Did he have this notice, and what did he do when the fact was brought to his knowledge that the drafts were not paid? That he had notice is not denied, and that he promised to pay them in four months thereafter is proved. It is true no formal notice was given appellant, but it is fairly *inferable, from the conversation with Cor- [352*] with in the Bank of Galena, that appellant well knew all the facts in relation to the nonpayment of the drafts by the Bank of Peru, and with this knowledge he made the promise to pay them in four months. *Tibbetts v. Dowd*, 23 Wend., 379, and cases there cited.

It would seem, however, from the manner in which this trial was conducted in the various efforts to prove a guaranty of these drafts by appellant, that appellee really considered the Bank of Peru the party liable, and that it was necessary to their success they should prove a guaranty. And, in truth, there was ground for such an idea, furnished by the repeated drafts drawn after the date of the letter of credit, and their payment by Parks, who was enabled to control the wheat sent forward to meet them. But their true position was that of holder of unpaid drafts, on which the drawer was responsible after their dishonor by the drawee, and notice thereof to the drawer.

The next point made by appellant is, that appellee cannot recover on the special counts on the bills of exchange, against appellant, their sole remedy being against the Bank of Peru. The bills of exchange here spoken of are the drafts in suit, which are all counted on in the declaration, with proper averments of presentment and nonpayment and notice to appellant, and a promise by him, with a knowledge of all the facts, to pay them.

If the views we have presented in discussing the first point

be correct, and of this we do not doubt, this point is disposed of also.

The drafts not being accepted drafts by the Bank of Peru, or if accepted, not paid by that bank, the remedy over, by appellee against the drawer, cannot be disputed. The transaction with appellee does not appear to us to be of the character given to it by the appellant. He seems to think that by drawing these drafts and getting the money on them from the appellee, he was but selling his grain, whereas, it seems to us, that this was the mode appellant resorted to, by which to raise [353*] money to *purchase grain. The advances were all made by appellee on appellant's responsibility, and to inspire confidence in the drawee, the Bank of Peru, that the drafts had a sufficient basis to rest on, the receipts of the railroad were attached to, and sent on with the draft, thereby assuring the Bank of Peru that value would be under their control sufficient to satisfy them. Such transactions are quite common, and sometimes greatly aid the enterprise of business men, and increase trade. In no light in which we can look at the transaction, can the appellee be considered as the purchaser of this grain. They advanced the money to purchase it, taking for their protection the drafts on the Bank of Peru, with railroad receipts to their value, attached to them, and the drafts being all payable fifteen days after sight, the Bank of Peru, the consignee, was enabled in that time to get the funds to meet them, which they did do, in all but three cases, as Parks, for whose benefit the arrangement was made, took up the drafts as fast as presented with the exception stated. How the transaction can be regarded as a sale by appellant of the grain to appellee, we cannot understand. When appellant wrote to Parks that it was against his principles to sell grain on time, and he Parks must make such arrangements at Galena as to get the cash for the wheat on delivery, had no reference to a sale of wheat at Galena; that is the place where it was bought, but it was to be delivered at La Salle, and an arrangement must be made at Galena, by which, when the wheat was delivered at La Salle, it would be

paid for, and this arrangement was the letter of credit from the Bank of Peru, and which answered the purpose from June to November. Appellee was not buying grain, but furnishing funds to appellant with which he could buy it.

It is very apparent, these banks kept running accounts with each other, and the appellees were creditors of the Bank of Peru for all the moneys received by that bank on account of their drafts, and the Bank of Peru was the debtor to appellee for the same. This is undeniable. The balances in favor of appellee were met by money by express, by exchange on Chicago and elsewhere, and money was passing between them all the while. So says cashier Hunt. [354*] All these drafts were charged by appellee against the Bank of Peru, and the account credited by remittances. The drafts were sent with instructions to remit. When, therefore, the two drafts described in appellee's third and fourth counts, and which were produced on the trial, marked on their face "paid," and which Parks testified he had paid, when they were so paid to the Bank of Peru, that bank became the debtor of appellee for their amount; for it is apparent the Bank of Peru had this credit with the appellee all along, as the business progressed, until the 17th November, 1860. For this amount, appellant is clearly entitled to a credit, for these his drafts were paid to the party and in the mode and manner expected and understood by appellee; and if the Bank of Peru proved dishonest and unfaithful, the appellant is not implicated. His promise to pay the drafts only embraced such drafts as had not been paid; for it would be unreasonable to suppose he would, without a consideration, undertake and promise to pay drafts which had been paid in the mode and manner agreed upon. If appellee has not been so fortunate as to receive proceeds, the loss must be his, and the judgment, to the extent of these two drafts, is erroneous, and must be reversed.

Another point made by appellant is, that the court erred in refusing to give appellant's fifth instruction, to the effect that

the plaintiff below, before he could recover in this suit, if at all, must account for the value of the wheat.

From what we have already said, this instruction was properly refused, for appellee had nothing to do with buying or selling wheat. The receipts of the railroad were mere vouchers of the quantity of wheat shipped, which no party supposed the Bank of Galena was to go into the market with and sell. Appellee had nothing to do with the wheat, nor was it at any time agreed that the Bank of Galena should have anything to do with it. It was purchased for Parks, and he controlled the receipts after they were transmitted to the Bank of Peru. It is not true that appellee had control of this wheat, or any power to sell it. They did not receive the railroad receipts for any purpose of control, but for the purpose stated. [355*] Appellant *never passed the wheat to appellee for so much money, nor for any purpose, as the case plainly shows, consequently there is no obligation on appellee to account for the wheat, and the instruction was properly refused.

The other point made by appellant as the fourth, to the effect that Parks having taken up and paid two of the drafts sued on, no action could be maintained against the defendant, has been disposed of by allowing the same. The instruction should have been given so far as to tell the jury if any of these drafts had been paid to the Bank of Peru, then that bank became the debtors to the Bank of Galena for their amount, and Kupfer was not liable on them.

About the time these drafts should have been paid, the Bank of Peru sent a remittance to appellee, under date of November 21, 1860, of two thousand and forty-two $\frac{13}{100}$ dollars, "for balance of account as advised." Now, as no officer of the Bank of Galena, or other person, has stated what balance this was, and when the cashier, who ought to know, fails to tell on what account this remittance was sent, but contents himself with saying it "was irrespective of any particular drafts," the inference is not a forced one that it was on account of these drafts. But be that as it may, the appellant is entitled to credit for them.

The fifth point made by appellant is the refusal to give the instruction in regard to the right of appellant to have the difference allowed him between American gold and paper money.

This right, it seems to us, is very evident, very reasonable, and unquestionable. This deposit of gold coin was a special contract, to the effect that appellee would return the coin, or, on failing to do so, appellant should be entitled to the value of the coin. The appellant was entitled, if he was paid in currency at a discount, to have the amount of that discount allowed to him, or, in other words, he was entitled to receive of the bank the premium at which gold was sold over currency, and this for the whole amount deposited, unless he agreed to receive currency as coin. The bank had no right to make appellant's check for currency a charge against this deposit of gold. What *the gold was worth over and [356*] above currency, at the time appellant drew it out, should be allowed. The several acts of congress making treasury notes a legal tender in the payment of private debts were not then enacted; consequently, appellant was entitled to recover the value of the gold coin.

These are the principal points made by the appellant. Another of minor consideration is, the admission of parol proof of the contents of these drafts. We think the affidavits of Corwith were sufficient to let in such proof.[1]

For the reasons given, the judgment of the court below is reversed, and the cause remanded for other proceedings not inconsistent with this opinion.

Judgment reversed.

[1] These affidavits stated that Corwith was managing agent of the Bank of Galena; that the drafts in question were forwarded to the drawee, the Bank of Peru; that affiant had applied to said bank for them, but was informed that they were not there, and that the former cashier of the Bank of Peru had absconded to Canada, and had either carried them with him or destroyed them; that thorough search was made for them by the officers of the Bank of Peru among its papers and files, but that they could not be found.

The People ex rel. Western Transp. Co. vs. The Superior Court of Chicago.

Practice: *Removal of a cause from a state to a United States court; what the petition should state.*

The petition to be filed for the removal of a cause from a state court to the circuit court of the United States, under the act of congress of September 24, 1789, is not required to state the alienage or citizenship of the parties, or the amount in controversy.

The petition is, however, required to contain a prayer for the removal of the cause, and, as a matter of practice, it may appropriately state the facts upon which the removal is sought.

Same: *How the facts to warrant a removal are to be established.*

The act of congress does not require the petition to be verified in any manner. The facts upon which the petitioner bases his right to a removal must be made to appear to the satisfaction of the state court, but no particular mode is prescribed in which they are to be made to appear, which may be by the admissions of the parties, by affidavit, or by the testimony of witnesses. The usual mode is by stating them in the petition, and having its truth verified by affidavit.

Same: *When the petition should be disposed of.*

Upon the filing of a petition of that nature, the court should dispose of it at its earliest convenience, and no step should be taken in the cause until this is done.

Same: *Order upon such petition how reviewed.*

The proper practice for a party objecting to an order upon a petition for the removal of a cause from a state court to the circuit court of the United States is to preserve the evidence upon which it was made in a bill of exceptions.

Same: *Citizenship to be shown at the time suit was commenced.*

Where a petition verified by affidavit alleged that the plaintiffs were, on December 9, 1863, the time it was sworn to, citizens of this state, but did not allege that they were citizens of the state on the 25th of August, 1863, when the suit was commenced, and there was no evidence of that fact: *Held*, that the evidence afforded by the statement in the petition that the plaintiffs were citizens when it was sworn to was not sufficient evidence to show that they were citizens when the suit was commenced, and that an order for the removal of the cause was properly refused.

Application to the Supreme Court for a writ of *Mandamus*.

The case is sufficiently stated in the opinion.

Bates & Touslee, for petitioner. *A. W. Arrington*, for respondent.

Beckwith, J. The petition to be filed for the re- [357] moval of a cause from a state court to the circuit court of the United States, under the act of congress of September 24, 1789, is not required to state the alienage or citizenship of the parties, or the amount in controversy. The act of congress does not require the petition to be verified in any manner. It requires the petition to contain a prayer for the removal of the cause, and as a matter of practice it may appropriately state the facts upon which the removal is sought. The facts upon which the petitioner bases his right to a removal must be made to appear to the satisfaction of the state court, but no particular mode is prescribed in which the facts are made to appear. The necessary facts may be satisfactorily made to appear by admissions of the parties, by an affidavit, or by the testimony of witnesses. The usual mode in which such facts are made to appear is, by stating them in the petition for the removal of the cause, and having its truth verified by affidavit. Upon the filing of a petition of that nature, the court should dispose of it at its earliest convenience, and no step should be taken in the cause until this is done. At the hearing of the petition, the petitioner should adduce satisfactory evidence of the facts which the act of congress requires to have existed, to entitle him to a removal of the cause. If there is no satisfactory evidence offered of such facts, it is the duty of the court to refuse the prayer of the petition. Suppose the evidence was an affidavit of the truth of a petition, and the court should be entirely satisfied that it was false, and that requisite facts did not exist, it certainly would not be its duty to order a removal of the cause.

The proper practice is for the party objecting to an order upon the petition to preserve the evidence upon which it was made in a bill of exceptions, and the record would then show whether the order was or was not erroneous.

In the case *under consideration the only evi- [358*]

dence before the court below was the statements contained in the petition, the truth of which was verified by affidavit. The petition does not show that the plaintiffs were citizens of the state of Illinois at the time when the suit was commenced, and there was no evidence of that fact. The petition does allege that the plaintiffs were, on the 9th day of December, 1863, at the time it was sworn to, citizens of this state, but we are of the opinion that the evidence that the plaintiffs had the requisite citizenship at that time is not sufficient evidence to show that they had it on the 25th of August, 1863, when the suit was commenced. *Savings Bank v. Benton*, 2 Metc. (Ky.), 241; *Rogers v. Rogers*, 1 Paige, 184. As there was no evidence before the court below that the plaintiffs were citizens of Illinois at the time when the suit was commenced, its refusal to order a removal of the cause was correct.

The prayer for the petition for a mandamus is denied.

Mandamus refused.

William Hall vs. Llewellyn Marks.

Constitutional Law: *Clerk of court cannot be authorized to render judgment.*

The rendition of a judgment by default and the assessment of damages are judicial acts, and belong to the judicial and not the ministerial part of the court. The clerk of a court, though attached to the judicial department, is only a ministerial and not a judicial officer of the court; he cannot, therefore, under article second of the constitution, dividing the powers of government into three distinct departments, and prohibiting members of one department from exercising any power properly belonging to either of the others, be authorized by the legislature to render judgment by default and assess damages thereon in vacation, and such a judgment is unauthorized and void.

Error to Circuit Court of *De Kalb* County.

The case is sufficiently stated in the opinion of the court.

B. F. Parks, for plaintiff in error. *Glover, Cook & Campbell*, for defendant in error.

WALKER, C. J. *The constitutionality of the sixth [362*] and seventh sections of the act of 1857, regulating the practice in the thirteenth judicial circuit is questioned by the assignment of errors upon this record. Those sections declare that when suit is brought upon a written instrument, only for the payment of money, a copy of the declaration may be served with the summons, and a notice to the defendant, that unless he shall appear and plead within twenty days, a judgment will be rendered against him for the amount that is due on the instrument. And if the defendant, after such service, shall fail to appear and plead within that time, judgment may be rendered against him in vacation. If he shall appear and plead, he is required to file an affidavit of merits with his plea.

The second article of our constitution declares that the powers of the government shall be divided into three distinct departments, and each of them confided to a separate body of magistracy, to wit, those which are legislative to one; those which are executive to another; and those which are judicial to another. And the second section of the same article declares that, "No person or collection of persons, being of one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted, and all acts in contravention of this section shall be void." The power to adjudge, determine and render a judgment is beyond all question a judicial act, and under this provision can only be done by judicial authority. It belongs to that department, and if exercised by either of the other departments, this provision declares the act void. The rendition of a judgment by default and the assessment of damages is manifestly judicial. Before a default is entered it must be judicially determined that a sufficient summons had issued and legal service has been had upon the defendant, and the assessment of damages belongs to the judicial and not the ministerial department of the court. It must be done by a jury under the direction of the judge, or at least their finding must be passed upon and approved by the court. The consideration of the facts, and the application of the

[363*] law *to those facts, and the conclusion deduced by the court from the law and the facts constitute a judgment. The power to announce and have enforced this conclusion has been confided exclusively to the judiciary of our state government.

The constitution has conferred this power, as we have seen, upon the judicial department, and has only authorized the officers, composing that department to exercise the power. That instrument has designated the judges and magistrates of the various courts it has created or authorized to be formed, as the officers authorized to exercise the judicial power of the state. They alone have the power to consider, determine and adjudge of the sufficiency of process and its service, by which a party is brought into court, and in determining when he is properly before the court, and has failed to perform some legal duty or comply with some rule of court, and shall be adjudged to be in default. The court alone, through a proper ministerial officer, has the right to issue a writ of inquiry to assess damages on a judgment rendered on default. These all being judicial acts, they cannot be performed by a ministerial officer, as the constitution has confided the power alone to a judicial officer.

It would be a perversion of language to call a clerk of a court a judicial officer. He is attached to the judicial department, but is only a ministerial officer of a court. He is only the instrument the law has designated, for convenience and the dispatch of business, to record the determination and sentence of the court. Every order or judgment he can lawfully enter, is the judicial sentence of the court. He possesses no power or jurisdiction to render a judgment, but only to enter it under the express or implied order of the judge, in the exercise of judicial power. The clerk, then, not belonging to the magistracy composing the judicial department, and the constitution neither having required nor permitted, but having prohibited, him from the exercise of such power, the general assembly cannot confer the power. The judgment of default rendered by him in vacation is, therefore, unauthorized and void. This provision of the practice of the thirteenth circuit is repugnant

to the constitution, and not only so, but is expressly prohibited.

This case is not similar to, nor does it depend upon [364] the power of the clerk to record a judgment confessed in vacation. There it is done by express authority from the debtor, who enters his appearance and specifies the amount for which the judgment shall be entered, whilst under this act, the clerk is authorized to bring the party before him and to adjudge and determine the amount he owes the plaintiff, to render judgment, and award execution to enforce his sentence. But if the two cases depended upon the same principle and could not be distinguished, the judgment by default entered in vacation could not be sustained, and the other would be overruled, but we think that there is a clear and broad distinction. If this judgment may be sustained, we are at a loss to determine what judicial power might not be rightfully conferred upon the clerks of our courts by legislative enactment. If he may rightfully render a judgment by default, assess the damages and enter final judgment, and award execution, we cannot perceive why the power may not be conferred to determine the sufficiency of the pleadings, compel the formation of issues, impanel juries to try issues of every description, render judgments, and, in a word, perform all the duties of a judge of the court. If this law were sustained, where could we say that the judicial acts of the clerk should end? The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

JOHN R. SMITH vs. THOMAS B. BRYAN.

CONSTITUTIONAL LAW: *General banking law; subject to amendment.*

Section 5 of article 10 of the Constitution of 1848, providing that "no act of the general assembly authorizing corporations or associations with banking powers shall go into effect, or in any manner be in force, unless the same shall be submitted to the people at a general election next succeeding the passage of the same, and be approved by a major-

ity of all the votes cast at such election for or against such law," does not prohibit the amendment of the general banking law of 1851 except by a vote of the people. Like natural persons, in the exercise of their rights of organization and existence, banking corporations organized under said law are subject to the control of the legislature by general laws, and those rights which are not designed to be secured to them as property are subject to legislative control in the same manner as the general rights of an individual. The amendatory act of February 14, 1861, facilitating the remedy of a creditor of the bank against stockholders was not, therefore, required to be submitted to a vote of the people.

SAME: *Change of remedy simply does not impair the obligation of a contract.*[1]

Every individual in the state is subject to such changes in the remedy provided for a redress of grievances, as the legislature may prescribe, and they will be enforced, if they do not impair the obligations of the contract on which the suit is brought.

SAME: *Same.*

The act of February 14, 1861, entitled "An act to amend the general banking law in such a manner as to afford greater security to the public," and which does nothing more than to provide a more speedy remedy to a bank creditor, by which the liability of stockholders can be sooner reached than by the general law; and which simply provides that when a judgment is obtained against a bank, a stockholder may be made a party to it before execution issues against the bank; but which does not provide that execution shall issue against the stockholder before the property of the bank is exhausted, does not in any way impair or affect the obligation of the contract of the stockholders, and is not unconstitutional.

ERROR to Circuit Court of *McLean* County.

Scire facias brought by Thomas B. Bryan against John R. Smith and others as stockholders in the La Fayette Bank, which was organized in July, 1856, under the general banking law of this state, and against which a judgment had, in 1863, been rendered in favor of said Bryan, to show cause, if any they had, why they should not be made parties to said judgment.

Separate pleas were filed by said defendants: (1) That no one of said defendants was ever a stockholder in said bank, and issue thereon. (2) That the creditors of said bank put the same in liquidation in 1861, and that its assets had all

[1] See Bruce *v.* Schuyler, 4 Gilm., 221; Billings *v.* Riggs, 56 Ill., 483.

gone into the possession of a receiver duly appointed in said proceedings. (3) Same as last, and also that said assets so in the auditor and receiver's hands were sufficient to liquidate all the bank's debts. (4) Same, and also alleging the non-issue of execution, and its nonreturn wholly or in part unsatisfied. (5) Same, and also alleging that the said auditor and receiver had not wound up the affairs of said bank.

A demurrer was sustained to all said pleas except the first; and the error assigned was in sustaining said demurrer, it being insisted that the amendatory act of February 14, 1861, was unconstitutional and void; and that, even if constitutional, it was applicable only to banks chartered after its enactment.

R. E. Williams, for plaintiffs in error. *Tipton & Benjamin*, for defendant in error.

Breese, J. The plaintiffs in error contend that [374] the general banking law of 1851 cannot be altered, except by a vote of the people, and by section 38 of that law, the assets of the bank must first be exhausted before a stockholder can be made liable.

We do not think, when this subject is considered, that this grave constitutional question can properly arise.

What does the constitution provide, and what are the provisions of the act in question? Section five of article ten of the constitution of this state contains the following provision: "No act of the general assembly authorizing corporations or associations with banking powers shall go into effect, or in any manner be in force, unless the same shall be submitted to the people at the general election next succeeding the passage of the same, and be approved by a majority of all the votes cast at such election for or against such law." Scates' Comp., 71.

The fourth section provides that "the stockholders in every corporation or joint stock association for banking purposes, issuing bank notes or any kind of paper credits to circulate as money, shall be individually responsible, to the amount of

their respective share or shares of stock in such corporation or association, for all its debts and liabilities of every kind." Ibid.

On the 15th of February, 1851, the general assembly enacted what is known as "the general banking law," which on being submitted to the popular vote in the mode and [375*] at the time pre*scribed, received a majority of all the votes cast at the election, and thenceforth the law took effect and was in force.

By section 38 of this act, it is provided, after reciting the 4th section of article 10 of the constitution, as above, "when the property, rights, credits, assets and effects of any corporation or association, put into liquidation under the provisions of this act, shall have been exhausted in the redemption of the notes and payment of liabilities, and there shall remain unpaid any indebtedness or liability of any kind, any person having a right or cause of action upon or on account of such remaining indebtedness or liability, shall have a remedy in any court of record having jurisdiction, against the stockholders, for the amount due upon such indebtedness or liability, and, to enforce this remedy, may institute actions or suits in equity, etc. Scates' Comp., 119.

On the 14th of February, 1861, the general assembly passed an act entitled "An act to amend the general banking law in such manner as to afford greater security to the public."

By the 1st section of article 4 of this act, it is provided that "in all suits at law or in equity against banking incorporations, a service upon any stockholder shall be deemed good service upon the corporation, where officers of the bank cannot be found, and such fact shall appear by the sheriff's return upon the summons. In every such suit against the bank, and in any suit against one or more of the stockholders, a summons may be served upon any stockholder not a defendant, who shall be entered as a defendant from the date of such summons; and the judgment or decree rendered in such suit shall be a lien, etc., upon the real estate of said bank and every stockholder so served with summons, from the day of ren-

dition and execution issued thereon shall be a lien on the personalty, etc. The entry of judgment shall contain the names of all stockholders served. The property, both real and personal, rights, credits and effects, legal and equitable, of such bank, shall be liable first to be seized and sold, or applied in payment of judgments against stockholders, on their liability under the constitution; and the property of stockholders shall not be *taken or applied until the assets of the [376*] bank are first exhausted." Sess. Laws 1861, pp. 49, 50.

It is further provided, by section 4 of the same article, that "Whenever any judgment shall be rendered against any such bank or association, it shall be lawful, without waiting for execution against such bank or corporation, to sue out a garnishee process against the stockholders thereof, to show cause why judgment should not be rendered against them; and upon the service of such process, the court shall direct issue or issues to be made in the case; and such proceedings may be had thereon as are authorized in section 38 of the act to establish a general system of banking, approved February 15, 1851. Judgment may be rendered against any one or more stockholders who may be served with process." Id., 50, 51.

The constitution, by the fourth section of article ten, which we have quoted, declares the general principle that stockholders in banking associations shall be individually liable for the the debts of the corporation to the amount of their stock. The law adopted by the people, by the thirty-eighth section provided the means by which this liability could be enforced. It gave to a creditor a remedy against a stockholder on the exhaustion of the assets of the bank. Experience proved that this remedy, so provided, was not adequate to the security of the public; hence the act of 1861, with its peculiar title.

This act does nothing more than to provide a more speedy remedy to a bank creditor, by which the liability of stockholders can be sooner reached than by the general law. He can proceed against them to judgment, without waiting for an execution against the bank.

That the remedy in all cases for the redress of grievances of

every nature is entirely within the control of the legislature cannot now be questioned. It has been too often so held, to be longer an open question. *Williams v. Waldo et al.*, 3 Scam., 264; *Reapers' Bank v. Willard*, 24 Ill., 437; *Wood v. Child*, 20 id., 211; *Bronson v. Kinzie et al.*, 1 How., 311. This case, so far as the doctrine of remedy is concerned, is in harmony with the case in Scammon. The point of differ-
[377*] ence is, that *this court did not hold that the contract was impaired by a change of the remedy.

In this case we cannot perceive in what manner any right growing out of contracts a stockholder in one of these corporations may be supposed to possess, which have been encroached upon or taken away from him by this law. It simply provides when a judgment is obtained against a bank, a stockholder may be made a party to it before execution issues against the bank; but it does not declare or provide that execution shall issue against them before the property of the bank is exhausted. That is fully provided for by the first section of article six, which we have quoted. The liability of the stockholder is in no manner or degree increased; the only change made by the act of 1861, being that which allows them to be made parties to a judgment against the bank before an execution shall have issued against the bank.

But that the legislature has the power to amend the general banking law, is settled by the case of *The Bank of the Republic v. The County of Hamilton*, 21 Ill., 53. The amendment, then, was of a most important character, affecting, in a very serious degree, the interests of the corporation. We then held that, like natural persons, in the exercise of their rights of organization and existence, they are subject to the control of the legislature by general laws, and that those rights which are not designed to be secured to it as property are subject to legislative control in the same manner as the general rights of an individual. Every individual in the state is subject to such changes in the remedy provided for a redress of grievances as the legislature may prescribe, and they will be enforced, if they do not impair the obligations of the contract

on which the suit is brought. We fail to perceive, in this case, in what way the contract of these stockholders has been impaired or its obligation increased or affected in any manner by the act in question.

The judgment must be affirmed.

Judgment affirmed.

Felix Beauchamp et al. vs. Reuben Putnam. [378]

Practice in Chancery: *Cross-bills may be filed as a matter of right; stay of the hearing of original cause.*

The filing of a cross-bill is a matter of right, and requires no leave; but it does not necessarily stay the hearing of the original cause.[1] If the complainant in the cross-bill desires a stay of proceedings, he should make an application for that purpose which, when made at the proper time, or when the furtherance of justice requires such a bill to be filed, will usually be granted.

Same: *Same.*

A defendant desiring to file a cross-bill should do so without delay, and have the same at issue, if practicable, so as to be heard with the original bill. If he desires any further time, or that the two causes be heard together, he must seek it as a matter of indulgence.

Same: *Court may give time to answer cross-bill.*

The court is not required, at the hearing of an original cause, to order the defendants to a cross-bill to plead, answer or demur *instanter*. It may give time for answering, and postpone the hearing until the answer comes in; or it may give time, and proceed with the hearing.

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[1] See Myers *v.* Manny, 63 Ill., 211; Hungate *v.* Reynolds, 72 id., 425.

As to the object, scope, etc., of cross-bills, see Ballance *v.* Underhill, 3 Scam., 453; Tarleton *v.* Vietes, 1 Gilm., 470; Morgan *v.* Smith, 11 Ill., 195; Jones *v.* Smith, 14 id., 229; Hurd *v.* Case, 32 id., 45; Ferris *v.* McClure. 36 id., 77; Atkin *v.* Merrill, 39 id., 63; Stone *v.* Smoot, 39 id., 409; Howett *v.* Selby, 54 id., 151; Kennedy *v.* Kennedy, 66 id., 190; Thompson *v.* Shoemaker, 68 id., 256; Campbell *v.* Benjamin, 69 id., 244; Wing *v.* Goodman, 75 id., 159. As to cross-bills in mechanics' lien cases, see Howett *v.* Selby, 54 id., 151; Thielman *v.* Carr, 75 id., 385. As to making answer a cross-bill, see Thielman *v.* Carr, *supra*.

On the subject of parties to cross-bills, see Kennedy *v.* Kennedy, 66 Ill., 190; Thompson *v.* Shoemaker 68 id., 256.

EQUITY JURISDICTION: *Defense at law to action upon title bond.*

Where, for a failure to convey within the stipulated time, an action was brought against the obligor for the use of the assignee of a penal bond conditioned for the conveyance within one year to the obligee or his assignees, of a certain tract of land; and pending said action, but before the trial, the obligor caused to be executed and delivered to the assignee, who was in possession of the premises, a deed sufficient to vest in him a perfect title thereto, which deed was received by the assignee, subject to, but not waiving any claim by reason of not receiving the title at the proper time; whereupon the obligor filed a bill setting forth the facts and alleging various excuses for not having caused the deed to be executed before that time: *Held*, that the title to the premises having become vested in the assignee, for whose use the suit was brought, its acceptance was either an absolute bar of the action at law, or a bar *pro tanto* in mitigation of damages; that his excuses for the delay in not causing the deed to be made, if valid, were all proper to be considered as matters of defense at law; and, therefore, having as complete and ample opportunity to assert his rights in law as in equity, there was no reason for the exercise of equitable jurisdiction.

ERROR to Circuit Court of *Kankakee* County.

The case is sufficiently stated in the opinion of the court.

C. A. Lake, for plaintiff in error. *Thomas P. Bonfield*, for defendant in error.

[380*] *BECKWITH, J. This is a suit in equity to restrain the prosecution of a suit at law in favor of Antoine Lottenville against the appellee upon a bond executed by him, dated April 9, 1861, in the penal sum of $2,000, conditioned that he should, by deed, with the usual covenants, convey to Lottenville, the obligee, or his assigns, a tract of land in Kankakee county within one year from that time. The bill alleges that Lottenville had, by deed, conveyed all his interest in the premises to Beauchamp, who, soon after the execution of the bond, entered into, and still remains in possession of the premises. The condition of the bond not having been performed, a suit at law was brought upon it, for the use of Beauchamp, to recover damages; but before any trial was had, the appellee caused a deed to be executed and delivered to Beuchamp, which was sufficient to vest in him a perfect title

to the premises. He received the deed, subject to but not waiving any claim which he might have by reason of not receiving the title at the proper time. Thereupon the appellee filed the present bill, setting forth the execution and delivery of the deed last named, and a great number of excuses for not *having caused the deed to be made before that [381*] time, and prayed that the suit at law might be enjoined.

An answer was filed admitting the execution and delivery of the deed last named, and denying the truthfulness and validity of the excuses alleged for not causing it to be made at the proper time, and claiming damages for the delay. To the answer a replication was filed. At the hearing, the defendant asked leave to file a cross-bill, recapitulating his view of the controversy, and praying for damages sustained by the delay in the nondelivery of the deed, which was refused. The filing of a cross-bill is a matter of right, and requires no leave; but it does not necessarily stay the hearing of the original cause. If the complainant in the cross-bill desires a stay of proceedings, he should make an application for that purpose. Such applications are usually granted when made at the proper time, or where the furtherance of justice requires such a bill to be filed. A defendant desiring to file a cross-bill should do so without delay, and have the same at issue, if practicable, so as to be heard with the original bill. If he desires any further time, he must seek it as a matter of indulgence. The court is not required, at the hearing of an original cause, to order the defendants to a cross-bill to plead, answer or demur *instanter*. It may give time for answering, and postpone the hearing until the answer comes in, or it may give time, and proceed with the hearing. The complainant in the cross-cause must have it ready to be heard when the original cause comes on for a hearing, or procure a stay of proceedings, if he desires that the two causes shall be heard together.

But we are unable to perceive any occasion for filing the original bill. The title to the premises had become vested in Beauchamp, the assignee of Lottenville, for whose use the suit was brought, and the acceptance of the title was either an ab-

solute bar of the action at law, or a bar *pro tanto* in mitigation of damages. By appropriate pleas, the appellee could have set forth the facts and obtained all the relief which a court of equity could give him. His excuses for the delay in not causing the deed to be made, if valid, were all [382*] proper to *be considered as matters of defense. In short, he had as complete and ample opportunity to assert his defense in the action at law as could be given him to assert his rights in a court of equity. The same facts which would entitle him to relief in equity could have been used as a defense in the suit at law, and to the same extent; and we are unable to perceive any reason for the exercise of equitable jurisdiction.

The decree of the court below will therefore be reversed, and the bill dismissed.

Decree reversed.

GEORGE M. MIXELL and PHARES MIXELL vs. JOHN LUTZ.

FRAUDULENT CONVEYANCES: *By father to minor son.*

Where a father purchases and pays for land, and has the conveyance made to his minor son, the fact that the son pays no portion of the purchase money, does not render the transaction fraudulent as against subsequent creditors.[1]

SAME: *Same.*

It seems that such a transaction would not be fraudulent as against existing creditors, unless it also appeared that the deed was so made for the purpose of hindering and delaying them.

SAME: *Void only as to a creditor who has been defrauded.*

A voluntary conveyance, intended to defraud existing creditors, is valid and binding until avoided by some creditor who has been defrauded. Persons afterwards giving credit have no right to complain, as they did not look to the property as security for their debts.

WITNESSES:[2] *Codefendants in chancery.*

A defendant to a bill in chancery may be examined as a witness by his

[1] See Moritz *v.* Hoffman, 35 Ill., 552, and cases cited in notes.

[2] Interest no longer disqualifies, but only goes to the credibility of the witness. Rev. Stat. 1874, 488.

codefendant, if his testimony does not affect his own interest; so, in case his interest is equally balanced between the parties. or is against the interest of his codefendant.

SAME: *Wife of nominal defendant.*

The wife of a nominal defendant to a bill in chancery, who is a competent witness for a codefendant, may be examined as a witness in behalf of such codefendant.

SAME: *Complainant not competent in his own behalf.*

The complainant in a bill in chancery is no more competent to testify in his own behalf than a plaintiff at law.

Error to Circuit Court of *Tazewell* County.

The case is sufficiently stated in the opinion of the court.

B. S. Prettyman, for plaintiff in error. *Roberts & Ireland*, for defendant in error.

WALKER, C. J. This was a bill in equity, filed for [386] the purpose of having a deed canceled, which had been made to the son of Phares Mixell, who was a minor. It appears that the father negotiated the purchase of the land, paid the money and had the conveyance made to the son, which is claimed to have been fraudulent and void as to creditors, complainant claiming to be one of the number. It is alleged that he recovered a judgment at law against Phares Mixell, upon which execution was issued and returned no property found. The deed was executed in September, 1852, and the judgment was recovered in September, 1861, about nine years after the conveyance was executed. It abundantly appears from the evidence, that George P. Mixell, the minor, to whom the conveyance was made, paid no *portion of the pur- [387*] chase money. But this, in itself, does not establish fraud, unless it also appeared that the deed was so made for the purpose of hindering and delaying creditors of the father. There is no evidence that the father owed any other person at the time, and it is denied that he was indebted to defendant in error.

If the conveyance was made before the indebtedness was incurred, then there was no fraud, as there was no design to hinder or delay creditors at the time; and the credit was not

given upon the supposition that this property could be rendered liable for its payment. But if there were, at the time, other creditors, and the conveyance was made to defraud them, and the father owed the defendant in error nothing, we are at a loss to perceive what right he has to complain. They no doubt could have filed a bill and had the deed canceled and the property subjected to the debts of the elder Mixell, and if more than sufficient to pay them, and defendant in error had reduced his debt to a judgment before the surplus had been disposed of, he might, no doubt, have subjected it to the payment of his debt. But the deed was valid and binding until avoided by some creditor who had been defrauded. Persons afterwards giving credit have no right to complain, as they did not look to the property as security for their debts.

We now come to the question whether this debt existed at the time the conveyance was made. The father and mother both testify that in 1852, after defendant in error had recovered from his sickness, the parties looked over their accounts, and the balance which was found to be due to defendant in error was by agreement to be applied to pay the physician's bill, and to pay Mrs. Mixell for nursing him in his sickness. Phares Mixell also testifies that he borrowed no money of defendant in error to pay for the land, as alleged in the bill, nor was any of his money paid for that purpose. Both the father and mother of plaintiff in error testify that defendant in error advised the purchase of the land for George, and that he agreed to take the other half of the quarter section, but failed to do so for the want of means, which he had expected [388*] to col*lect at St. Louis. They also testify that the money paid for the land belonged to George's mother, and came to her from her father's estate. And this evidence is corroborated by the testimony of other witnesses. If this evidence may be relied upon, no portion of the money of defendant in error was paid for the land, nor was Phares Mixell indebted to him when the conveyance was made.

It was, however, objected that the father and mother were incompetent as witnesses for the son. The father was a co-

defendant, but that of itself is not sufficient to disqualify him. The rule is, that a defendant to a bill may be examined by his codefendant if his testimony does not affect his own interest; or in case his interest is equally balanced between the parties, he is competent. In this case the father's interest could not be injuriously affected by the decree. If a decree was rendered subjecting the land to the payment of his debt, it would be an appropriation of so much of the son's property for the satisfaction of his liability, whilst if it was not rendered liable, it left this debt unpaid. His interest was then against his codefendant, and in favor of defendant in error. If his codefendant saw proper to call him against his own interest, no reason is perceived why complainant should have a right to complain.

The practice, however, in a court of chancery, has never authorized the complainant to testify in his own behalf any more than at law. We are aware of no adjudged case which sanctions such a practice, and we have no power, even if so inclined, to change the rule. It is not even contended that the practice authorized complainant to testify in his own favor. It is contrary to the practice, and his evidence must be rejectd as unauthorized.

We do not discover that the evidence in the case established any fraud in the transaction, and the decree of the court below must therefore be reversed and the cause remanded.

Decree reversed.

[389*] *Illinois Central Railroad Company vs. Thomas Johnson.

Pleading: *Special plea amounting to the general issue.*[1]

A special plea, setting up only matters the reverse of which the plaintiff is bound to prove in order to make out a *prima facie* case, is bad on general demurrer as amounting to the general issue.

Same: *Same.*

Where, in assumpsit against a common carrier upon an alleged written agreement to forward goods to a point beyond the termination of its road, the defendant pleaded that by one of its regulations referred to in said writing and subject to which the goods were received, and which was then known and assented to by plaintiff, defendant was only to be liable for loss or damage to said goods while on defendant's road, and that its liability ceased upon their delivery to another carrier; with an averment that they were not lost or damaged by defendant, or on its road, but were safely delivered to the next common carrier on the route to their destination; and defendant pleaded, also, that it did safely carry and deliver said goods according to its freight regulations: *Held*, that both said pleas were bad as amounting to the general issue.

Practice: *Same; may be stricken out after demurrer overruled.*

There is no error in striking out a special plea amounting to the general issue, although stricken out after a demurrer to it has been overruled.

Error: *Not presumed; defense admissible under general issue presumed to have been so made, though the special plea setting it up is stricken out.*

Where the general issue, *non assumpsit*, is pleaded, and also a special plea, all the matters set up in which are admissible under the general issue, and the special plea is stricken from the files; the defense therein set up being admissible under the general issue, in the absence of anything in the record to the contrary, it will be presumed that the defendant availed himself of the right to make such defense under the general issue, and consequently the defendant having suffered no injury by striking out the plea, the judgment will not on that ground be reversed.

Statute of Limitations: *Action on written contract to carry goods.*

An action of assumpsit upon a written undertaking by a common carrier to carry goods is not, under the statute (Scates' Comp., 752), barred until the expiration of sixteen years from the time the action accrued.

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[1] See Cook *v.* Scott, 1 Gilm., 333; Abrams *v.* Pomeroy, 13 Ill., 133; Strader *v.* Snyder, 67 id., 404; White *v.* Clayes, 32 id., 325; Johnston *v.* Ewing Female University, 35 id., 518.

Illinois Central Railroad Company vs. Johnson.

COMMON CARRIERS: *Undertaking to carry goods beyond termination of road.*

Where a common carrier receives goods, and gives a receipt therefor stating that they are received for the consignee, at a specified place, beyond the termination of its road, to be forwarded by said carrier, it will be liable for a failure to transport said goods to their destination and there deliver them to the consignee, such receipt being considered an express agreement so to transport and deliver.[1]

APPEAL from Circuit Court of *McLean* County.

Assumpsit by appellee against appellant for the failure of appellant to forward to appellee at Wheeling, Va., certain goods received by appellant to be so forwarded under the following written agreement:

"Bloomington, June 14, A. D. 1856, received in apparent good order of John H. Johnson for Thomas Johnson, Wheeling, Virginia, four boxes and one trunk, one box in B. O., 820 lbs., contents unknown, to be forwarded by the Illinois Central Railroad Company, subject to freight and the regulations of the company. It is especially agreed and understood that the company are not responsible for damage to goods from fire or other unavoidable causes while in the buildings of the company awaiting shipment. S. W. DODD, *Agent.*"

Pleas: (1) *Non assumpsit.* (2) That one of the defendant's regulations mentioned in said agreement and subject to which said goods were received, and which the plaintiff then knew and assented to, was that defendant's liability for loss or damage sustained by said goods extended only to loss or damage sustained while on the line of its road, and was terminated by their delivery to another carrier, with an averment that said goods sustained no loss or damage by defendant nor on its road, and that defendant delivered the same safely to the next succeeding common carrier on the route to their destination. (3) That said goods were safely carried and delivered by defendant according to its freight regulations. (4) The bar of the five years' statute of limitations.

[1] Ill. Cent. R. R. Co. *v.* Frankenberger, 54 Ill., 88; Field *v.* Chicago & R. I. R. R. Co. 71 id., 462.

A general demurrer to the third plea was overruled, but was sustained to the second and fourth.

Upon plaintiff's motion, the third plea was then stricken from the files; and defendant's motion for leave to file an amended plea overruled.

The judgment was for the plaintiff with $339.70 damages.

The assignments of error are sufficiently stated in the opinion.

Glover, Cook & Campbell, for appellant. *Hervey, Anthony & Galt*, for appellee.

[393*] *Breese, J. The only questions presented by this record are, as to the propriety of sustaining the plaintiff's demurrer to the defendants' second and fourth special pleas, and striking out the third special plea, after a demurrer to it had been overruled.

The plea stricken out amounted to the general issue, as did the second plea. The plaintiff was bound to prove the reverse of all the matter contained in each of those pleas, to make out a *prima facie* case. The defendant had the right to controvert the *prima facie* case of the plaintiff, and we must presume that he did so. There is nothing in the record to the contrary, consequently the defendant suffered no injury by striking out the third plea. *Warner v. Crane*, 20 Ill., 151.

The action was brought on the written undertaking of the defendant to carry the goods to Wheeling, Virginia. It was not barred, therefore, until sixteen years had elapsed. It was a written contract, and within the provisions of the statute limiting actions on such contracts to sixteen years. Scates' Comp., 752. A plea setting up the bar of five years was no plea in the case, and was properly stricken out.

As to the liability of the defendant to transport these goods to Wheeling, there can be no doubt. It is an express undertaking to do so. In the case of the *Illinois Central Railroad Company v. Copeland*, 24 Ill., 338, we held, when a carrier receives goods to carry, marked for a particular place, he is bound to carry to and deliver at that place. It is only on

an agreement implied from the mark or direction on the goods, and accepting them so marked, that the liability arises. *Ladue v. Griffith*, 25 N. Y., 336. Much more is he bound when he undertakes expressly to carry and deliver.

The evidence is not preserved and we cannot say the verdict was wrong. The judgment must be affirmed.

Judgment affirmed.

JOHN MONTANYE vs. ISAAC HATCH et al., Adm'r of CHESTER POTTER, dec'd.

PRACTICE IN CHANCERY: *The court may state an account without a reference.*[1]

The court has power to perform the duties ordinarily performed by its master in stating a partnership account between the parties; and in such case each party has the same rights before the court, in regard to the production of books, examination upon interrogatories, etc., that he would have before the master.

ERROR to Circuit Court of *DeKalb* County.

The case is sufficiently stated in the opinion.

Leland & Blanchard, for plaintiff in error. *Gray, Avery & Bushnell*, for defendants in error.

[394*] *BECKWITH, J. This is a suit in equity to close the affairs of a copartnership between the plaintiff in error and one Chester Potter, deceased, of whose estate the defendants in error are administrators. The *copartner- [395*] ship was admitted, and its affairs were unsettled. The circuit court stated an account between the parties, and rendered a decree for the sum found due. There was no allegation or evidence of any outstanding debts or liabilities of the firm, and no account was required touching them. The court had power to perform the duties ordinarily performed by its mas-

[1] See Patten *v.* Patten, 75 Ill., 446; Moss *v.* McCall, id., 190; Stewart *v.* Kirk, 69 id., 513; Steere *v.* Hoagland, 39 id, 264; Bressler *v.* McCune, 53 id., 475; Riner *v.* Touslee, 62 id., 266; Groch *v.* Stenger, 65 id, 481.

ter in st. ting th· account between the parties. No injustice was done to either party, as each had the same rights before the court in regard to the production of books, examination upon interrogatories, etc., that they would have had before the master. 29 Ill., 500; *Jewett v. Cunard*, 3 Wood & Min., 277.

We are satisfied that the decree does the plaintiff in error no injustice, and it is affirmed.

Decree affirmed.

GEORGE F. DART and A. J. LOTHERY vs. CHRISTOPHER HERCULES.

APPEARANCE: *Waives defective process.*[1]

The only purpose of original process is to bring parties into court, and when the defendant enters his appearance, the object is accomplished, and it is not material whether the summons issued in the case was defective or not, or even whether it ever issued.

SAME: *Not withdrawn by withdrawing plea.*

By filing a plea in bar, a full appearance is entered, which is not withdrawn by withdrawing the plea. After it is withdrawn, the appearance still remaining, the plaintiff is entitled to judgment *nil dicit*, at any time before another plea is filed.

SWAMP LANDS: *Title to vested in state by virtue of the act of congress.*

The act of congress, approved September 28th, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim swamp lands within their limits," vested in the state the legal title to such lands as were selected and appropriated under its provisions, as effectually as if conveyed by a patent, and in such case no patent is necessary to pass the title.

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[1] See Colcen *v.* Figgins, Breese, 19; Eason *v.* Altum, 1 Scam., 250; Mitchell *v.* Jacobs, 17 Ill., 235; Vanderbilt *v.* Johnson, 3 Scam., 48; Mineral Point R. R. Co. *v.* Keep, 22 Ill., 9; Miles *v.* Goodwin, 35 id., 53; Dart *v.* Hercules, 34 id., 395; Dunning *v.* Dunning, 37 id., 306; Edens *v.* Williams, 36 id., 252; Roberts *v.* Formhalls, 46 id., 66; McBane *v.* The People, 50 id., 503: Ewbanks *v.* Town of Ashley, 36 id., 177; Phelps *v.* Reeder, 39 id., 172; O'Brien *v.* Haynes, 61 id., 494; Swift *v.* Lee, 65 id., 336; McNab *v.* Bennett, 66 id., 157; Bills *v.* Stanton, 69 id., 51; Fink *v.* Disbrow, id., 76; Gilberson *v.* Scott, 76 id., 509; Filkins *v.* Byrne, 72 id., 101.

SAME: *Certified copy of recorded list sufficient evidence of title.*

Under act of 1852 (Sess. Laws, 178), entitled "An act to dispose of swamp and overflowed lands, and to pay the expenses of selecting and surveying the same," and the amendatory act of 1854 (Laws of 2d Sess., 21), a duly certified copy of the list of such lands, made by the auditor and filed and recorded in the county clerk's office of the proper county, is all that is required to show title thereto in the state and county, and has the same force as a patent from the state for school lands.

CONVEYANCES: *Of swamp lands by counties through a special commissioner.*

Both by virtue of the general enactment contained in the revision of 1845 (p. 132), and by the act of February 16, 1857 (Sess. Laws, 122), the county of Livingston may convey the swamp lands within its limits by a special commissioner appointed for that purpose; and it is not requisite that the deed therefor be executed by the county clerk.

PLEADING AND EVIDENCE: *Venue in ejectment; how proved.*

In an action of ejectment, the fact that the land in controversy is situated in the county where the suit was brought may be sufficiently proved by the number of the section, township, range and meridian, without specific proof of the county wherein it is situated.

APPEAL from County Court of *Livingston* County.

Ejectment brought in the court below by appellee against appellants, in which the verdict and judgment were for the plaintiff.

The case is sufficiently stated in the opinion.

Clark & Keller, for appellants. *S. L. Fleming*, for appellee.

*WALKER, C. J. The only purpose of original process is to bring parties into court. And when the defendant enters his appearance, the object is accomplished, and it is not material whether the summons issued in the case was defective or not, or even whether it is ever issued. By an appearance to the action, the court acquires jurisdiction of the person of defendant as fully as it can be had by summons, with proper service. When he appears in the case it is an admission that he has been duly served, or that he waives service; and all the proceedings of *the court in the case are as valid and binding as if the process was regular and the service unobjectionable. By filing a plea in bar [402*] [403*]

a full appearance was entered, which was not withdrawn by withdrawing the plea. After it was withdrawn, the appearance still remaining, plaintiff below was entitled to judgment *nil dicit*, at any time before another plea was filed.

It is, likewise, insisted that appellee was not entitled to recover without producing a patent from the United States government, to the state of Illinois, for these premises. They being swamp lands, the title vested in the state, by the act of congress entitled "An act to enable the state of Arkansas and other states to reclaim swamp lands within their limits," and approved September 28, 1850. This act fully vested the legal title of such lands as were selected and appropriated under its provisions in the state. Government may pass title to its property by enactment as effectually as by a patent. When it is transferred in the latter mode, it is in pursuance of authority conferred upon a commissioner or agent appointed in pursuance of legislative enactment. Such agent only exercises the power conferred, and in the mode prescribed by the enactment. Such a law, in that case, is the foundation of the title, and operates as a deed or power of attorney, from the government to the agent. And if the government may confer the power upon an agent to convey, why not by enactment transfer the title to a purchaser or donee? There is no force in this objection.

The act of our legislature, entitled "An act to dispose of swamp and overflowed lands, and to pay the expense of selecting and surveying the same," adopted at the session of 1852 (Sess. Laws, 178), and the amendatory act of 1854 (Laws of 2d Sess., 21), declares the evidence of title of the state shall be filed in the auditor's office, and that he shall cause to be made out, for each of the several counties, a correct abstract or list of such lands; the correctness of which he is required to certify under the seal of his office. And it is provided that the lists so made shall be sufficient evidence of the title of the lands therein described. The list is required to be filed
[404*] in the county clerk's *office of the proper county, and to be recorded. It is also declared that this list shall

have the same force as patents issued for school lands, and duly certified copies of the same shall have the same force and effect as the original lists so filed and recorded. The production, then, of a duly certified copy of the list recorded in the county clerk's office was, under this enactment, all that was required to show title in the state and county, and has the same force as a patent from the state for school lands. This list was produced and read in evidence on the trial below.

It is again objected, that the county could not convey by a special commissioner, appointed for that purpose, but that the deed should have been executed by the county clerk. At an early day in the legislation of the state, an act was adopted authorizing county courts to appoint agents to convey real estate belonging to such county. This enactment was incorporated in the revision of 1845 [p. 132], and remains unrepealed and in full force. But if it were doubtful whether that law conferred the power, by the act of the 16th of February, 1857 (Sess. Laws, 122), the county of Livingston is authorized to sell swamp and overflowed lands within its limits; and the act provides that each of the counties named in the act, and which was acting under township organization, may make written contracts and conveyances relating to such lands which are required to be executed by a special commissioner appointed for the purpose by the board of supervisors. The evidence shows that a special commissioner was duly appointed to sell and convey this land, and no error is discovered in admitting his deed in evidence. That deed, in connection with the legislation of congress and this state shows a fee simple title in appellee.

There is no force in the objection that the evidence fails to show that the land in controversy is situated in Livingston county. That fact was sufficiently proved by the number of the section, the township, range, and meridian. The finding of the jury was warranted by the evidence, and any other would have been erroneous. No error is perceived in this record, and the judgment must be affirmed.

Judgment affirmed.

[405*] * The President and Trustees of the Town of Keithsburg vs. Charles A. Frick.

Municipal Corporations: *May be authorized to subscribe for stock in railroads without previous vote of citizens.*

It is competent for the legislature to confer directly upon a municipal corporation the power to subscribe for stock in railroads, without any previous vote of the town or city in favor thereof.

In this case, such power was conferred upon the president and trustees of the town of Keithsburg, by section 2 of the act of 1857, incorporating that town (Private Acts 1857, 868); and hence all question about the election held to authorize such subscription, or the fairness of it, was *held* to be foreign to the case.

Same: *Subscription of stock in, and issue of bonds by town of Keithsburg to Warsaw & Rockford R. R. Co.*

Where, in November, 1855, it was voted by the citizens of the town of Keithsburg, incorporated under the general incorporation law of 1849, that the corporation subscribe $20,000 to the capital stock of the Warsaw & Rockford Railroad Company; and subsequently, on the 16th of February, 1857, a special charter was granted incorporating said town, the second section of which authorized the president and trustees of said town to subscribe for and take stock to an amount not exceeding $20,000, and to issue the bonds of the corporation in payment therefor; and the seventeenth section of which purported to legalize and confirm said prior subscription to the full extent and purpose for which it was made; and on May 4, 1857, an ordinance was passed by the town authorities reciting said election, and said section 17 of said special charter, and authorizing the subscription of $20,000 to the capital stock of said railroad company, and the issue of bonds in payment therefor, which were, without any further vote therefor by the people, accordingly issued on June 1, 1857: *Held*, that said bonds were not issued by the corporation organized under the act of 1849, but under the authority of the special charter of 1857; that any question as to the power of the legislature to confirm the subscription, if made under the act of 1849, was foreign to the case; and that the subscription and the bonds issued in payment thereof were valid.

Same: *Legalization of subscription by a subsequent enactment.*

It seems, that a subscription to the capital stock of a railroad company, made in pursuance of a vote by the citizens of a town incorporated under the general incorporation act of 1849, may be legalized and confirmed by a subsequent enactment.

Estoppel: *Of town to set up irregularity in issue of its bonds.*

The second section of the special charter of the town of Keithsburg (Priv.

Acts 1857, 868) expressly authorized the president and trustees to subscribe for stock in a railroad company to an amount not exceeding $20,000, and to issue the bonds of the corporation in payment therefor; the seventeenth section purported to legalize and confirm a subscription theretofore made by said corporation to the railroad company, while the town was acting under the general incorporation act of 1849; the bonds were not issued till after the enactment of the special charter: *Held*, that whether the bonds were issued by virtue of the second or of the seventeenth section of the act of 1857, the corporation was estopped from setting up any irregularity in their issue, inasmuch as it had repeatedly recognized their validity by paying them out, levying taxes and paying the interest on them for a series of years.

Error to Circuit Court of *Mercer* County.

Debt by defendant in error against plaintiffs in error, upon certain coupons for interest alleged to be due upon certain bonds dated June 1, 1857, and executed by plaintiffs in error to the Warsaw & Rockford Railroad Company, of which bonds the defendant in error was the holder. These bonds and the coupons thereto attached were issued in pursuance of the following ordinance of May 4, 1857:

"Whereas, by virtue of an ordinance of a board of trustees of the corporation of the town of Keithsburg, heretofore made, said corporation then being duly authorized under a general act of the legislature of the state of Illinois, providing for the incorporation of towns and cities, an election was held in said town by the citizens, legal voters thereof, to vote for or against said corporation subscribing to the capital stock, in a sum not exceeding $20,000, to the Warsaw and Rockford Railroad Company, on the 4th day of November, 1855, in pursuance of public notice duly given by the clerk of said board of town trustees, which said election was conducted in the usual form, and which resulted in a unanimous vote in favor of taking said subscription; and whereas, afterwards, on the 16th day of February, A. D. 1857, a special charter was granted, incorporating the said town of Keithsburg, whereby the subscription taken as aforesaid was legalized by the provisions following, to wit:

"'Sec. 17. The subscription heretofore made by said cor-

poration to the capital stock of the Warsaw and Rockford Railroad Company of a sum not exceeding twenty thousand dollars, to be paid for in town bonds to run for twenty years at an interest not exceeding ten per cent., is hereby legalized and confirmed to the full extent and for the purpose for which such subscription was made; and the president of said corporation is hereby fully authorized and empowered to execute and issue said bonds, under his hand and the corporate seal of said town, and for the payment of which bonds and the interest accruing thereon as the same becomes due, the faith of said corporation shall be fully pledged and bound, and whenever said bonds shall be issued, a lien is hereby declared to be created against all the real estate within the bounds of said corporation, to secure the faithful payment thereof and the interest that may accrue thereon. The said president and trustees are hereby vested with full power to make provisions for the payment of the same by levying a special tax, to be collected as other taxes are, herein provided for.'

"Now, therefore, be it ordained, by the president and trustees of the corporation of the town of Keithsburg:

"SEC. 1. That the president of said board is hereby authorized, empowered and directed to subscribe in the sum of twenty thousand dollars to the capital stock of the Warsaw and Rockford Railroad Company, on the behalf and in the name of said corporation, by which said act of its executive officer the faith of said corporation shall be irrevocably pledged to said company in the sum of twenty thousand dollars; that for the assessments or estimates heretofore made, and hereafter to be made, on that portion of said Warsaw and Rockford Railroad between the stations at or near the town of Keithsburg, in Mercer county, and the town of Oquawka, in Henderson county, including the first five per cent. to be paid upon subscription, the president and clerk of said board, for the time being, shall execute the bonds of said corporation for the sum of one thousand dollars each, for the amount so assessed upon the stock so subscribed by the said corporation of Keithsburg,

signed by the president as provided for by the act of incorporation aforesaid, and also that the same bonds be attested by the clerk of said board, which said bonds shall be dated when issued, and shall be made payable in twenty years from the date thereof. The said bonds shall be made payable to the order of the Warsaw and Rockford Railroad Company, principal and interest, at the American Exchange Bank, in the city of New York, and shall bear interest at the rate of ten per cent. per annum, payable semi-annually, and for which coupons, bearing same date as the bonds aforesaid, signed by the president of said corporation, shall be attached. Said bonds, in other respects, shall be in the usual form, and shall be entitled, 'Warsaw and Rockford Railroad bonds,' upon the back of which this ordinance authorizing their issue shall be printed.

"That said bonds, when executed as provided in the preceding section, shall be delivered to the directors of the Warsaw and Rockford Railroad Company, in the payment of the subscription aforesaid by the said corporation of the town of Keithsburg to the capital stock of said company, as the board of trustees of said corporation shall from time to time direct."

Said ordinance also provided for the levy and collection of a special tax for the payment of the interest on such bonds; that the stock issued by said railroad company to the town, and the dividends thereon, should be applied solely to the payment of said bonds; and also prescribed the manner in which the vote of the town at elections of said railroad company, should be cast.

The judgment in the court below was for the plaintiff.

The questions raised upon error are sufficiently stated in the opinion.

Harris & Spaulding, for plaintiff in error. *J. R. & J. N. Bassett*, for defendant in error.

Breese, J. The plaintiff in error contends that [420] the town of Keithsburg, while acting under the general incorporation law, had no authority either to take stock

in a railroad company or to hold an election to vote on that question; that any subscription made by the town through its board of trustees, and the bonds issued for the same are void; that if the town had authority to hold an election for such purpose, the election in this case was fraudulent and void, because only a part of the legal voters of the town were allowed to vote; that the bonds being void, no act of recognition by the town, such as the payment of interest on them, would render them valid, nor could they be made valid or legalized by any act of the legislature.

However it may be as to the powers of the corporation of Keithsburg, under the act of 1849, it is, perhaps, not important to inquire, as these bonds were issued under the act of 1857, to incorporate the town. It is under a special charter which authorized the president and trustees to subscribe for and take stock to an amount not exceeding twenty thousand dollars, and to issue the bonds of the corporation in payment [421*] therefor, *to run for a term not exceeding twenty years, to draw interest not exceeding ten per cent. per annum, payable semi-annually, and to do all things in relation thereto as natural persons. Sess. Laws, private acts, 1857, sec. 2, p. 868.

There was no necessity to submit the question to the legal voters, as the act grants the power expressly to the president and trustees, the act having been accepted by the corporation as their charter.

But if the subscription was made under the organization allowed by the general incorporation law of 1849, the seventeenth section of the act of 1857 legalizes and confirms it, p. 874. The subscription, therefore, was good if made under the act of 1857, as an original subscription under the second section, or as a subscription made under the act of 1849 confirmed, as it is, by the seventeenth section of the act of 1857. The bonds may be regarded as issued by the old corporation confirmed by the new act, or as a new issue under the second section of the act of 1857.

That the legislature may authorize the municipal bodies to

subscribe stock in railroads has been often recognized by this court. *Johnson v. Stark County*, 24 Ill., 75; *Perkins et al. v. The President and Trustees, etc.*, id., 208.

It is by no means a necessary element in these subscriptions that there should be a vote of the inhabitants of the town or city authorizing them. It is competent for the legislature to bestow the power directly on the corporation without any intermediary, as they did in this case.

These bonds were not issued by the corporation organized under the act of 1849, but under the authority of the special charter of 1857, consequently, all question about the election, or the fairness of it, is foreign to the case. And so is the question raised as to the power of the legislature to confirm the subscription, if made under the act of 1849. No bonds were, in fact, issued until after the passage of the act of 1857.

Whether, then, the bonds were issued in and by virtue of the second section of the act of 1857 or of the 17th section, we think the corporation is estopped from now setting up any *irregularity in their issue, inasmuch as [422*] they have repeatedly recognized their validity by paying them out, levying taxes and paying the interest on them for a series of years. It is now too late to raise a question as to the regularity of their issue. The judgment must be affirmed.

Judgment affirmed.

Parnell Munson vs. Alvia Harroun.

Conflict between the Jurisdiction of State and Federal Courts: *Interference with final process.*

Neither a state nor federal court has any right to interfere with or control the proceedings or process of the other.

Where, therefore, a writ of *fieri facias* from a circuit court of the United States is levied by the marshal upon property which is claimed by a stranger, while such claimant may bring trespass or trover in the state court against the marshal for the alleged wrongful seizure of his

property, since replevin would work an interference with the process of the federal court, that action cannot in such case be maintained against the marshal for the recovery of the possession of the property.[1]

Error to Circuit Court of *Iroquois* County.

The case is sufficiently stated in the opinion.

Hoyne, Miller & Lewis, for plaintiff in error. *Chester Kinney* and *James Fletcher*, for defendant in error.

Beckwith, J. Munson, as deputy marshal, under a writ of *fieri facias* from the circuit court of the United [423*] States, for the northern *district of Illinois against the property of Wright, seized certain goods claimed by Harroun, who thereupon brought replevin in the state court.

We are of the opinion that the state court cannot lawfully interfere with the execution of final process of the federal court, at the instance and for the protection of a stranger alleging that his property has been tortiously seized in execution to satisfy the debt of another.

The question involved is not a new one; but if it were, we should have no difficulty in deciding it. The state and federal governments, while they are distinct parts of a complete system, are each supreme within the limits of the authority confided to them; each government is possessed of a judiciary power commensurate with its own objects and purposes, and partaking of its supreme authority; and the exercise of the judicial power in each is confided to the tribunals of the respective governments.

These tribunals are invested with the general as well as incidental powers necessary to the complete administration of justice; among these is the power of executing the final process of the court, whereby the execution is made the life of the law. And, in order that all conflict between the two judicial systems touching the right of either to administer justice and execute its process to the exclusion of the other might be avoided, the ultimate power of determining the boundary line

[1] See Davidson *v.* Waldron, 31 Ill., 120.

between the two jurisdictions was constitutionally vested in the courts of the United States, and their decision on that subject is conclusive.

Thus the judicial departments of the respective governments, so organized and adjusted with reference to each other, can never come in conflict while exercising only the authority rightfully belonging to them; and as a consequence, except in cases of appellate jurisdiction from the state to the federal courts, the courts of neither can have any right to interfere with or control the proceedings or process of the other. *Diggs v. Walcott*, 4 Cranch, 178; *Peck v. Jeness*, 7 How., 612; *Freeman v. Howe*, 24 id., 450.

While the property claimed by Harroun yet re- [424]
mained in the custody of the marshal who had seized and was holding it on final process out of the federal court, that court, so far as reaching the property itself, had the exclusive authority to enquire into and determine the question of the rightfulness of such custody, upon which the proper execution of its process depended. Had the defendant in error sought relief in that court while the property was thus held, he could have been protected in all his rights; if he did not choose to adopt that course, he still had his action of trespass or trover in the state court against the marshal or his deputy for the wrongful seizure. But since replevin would work an interference with the process of the federal court, that action cannot in such case be maintained.

The judgment of the court below is reversed and the cause remanded.

Judgment reversed.

Breese, J., dissented.

Richard B. Woolford vs. George Dow.

Surety: *Released by extension of time of payment to principal.*

If the time for payment of a promissory note is extended by a binding agreement between the holder and the principal debtor, without the consent of the surety, the latter will be released from all liability, unless he subsequently ratifies the agreement.[1]

Same: *The agreement to extend must be sustained by a new consideration.*

Such agreement to be binding must be sustained by a new consideration. Where, therefore, a note of $1,000 was due in six months from its date with ten per cent. interest; and the holder, without the consent of the surety, after the note matured, agreed with the principals to extend the time of payment, if they would pay the ten per cent. interest and one hundred dollars each month in liquidation of the note until it should be paid, it was *held* that, there being no new consideration, the agreement for an extension was a mere *nudum pactum*, and therefore that the surety was not released. Had the interest been paid in advance after the maturity of the note, it would have constituted a consideration for the agreement.

Appeal from Superior Court of *Chicago.*

Assumpsit brought in the court below by appellee against appellant, and Allen Vane and Renssalear Stone (the two latter composing a firm, styled Allen Vane & Co.), upon the following promissory note:

"$1,000.00. Chicago, *February 9, 1861.*

"Six months after date, for value received, we promise to pay George Dow, or order, one thousand dollars, with ten per cent. interest.

Allen Vane & Co.

R. B. Woolford."

[1] See Davis *v.* The People, 1 Gilm., 409; Waters *v.* Simpson, 2 id., 570; Warner *v.* Campbell, 26 Ill., 282; Warner *v.* Crane, 20 id., 148; Flynn *v.* Mudd, 27 id., 323; Galbraith *v.* Fullerton, 53 id., 126; Kennedy *v.* Evans, 31 id., 258; Montague *v.* Mitchell, 28 id., 481; Ward *v.* Stout, 32 id., 399; Farwell *v.* Meyer, 35 id., 40; Phares *v.* Barbour, 49 id., 370; The Governor *v.* Lagow, 43 id., 134 (extension by statute); Same *v.* Bowman, 44 id., 499 (extension by statute); Silmeyer *v.* Schaffer, 60 id., 479; Trotter *v.* Strong, 63 id., 272; Liebbrandt *v.* Myron Lodge, 61 id., 81; First Nat. Bank *v.* Whitman, 66 id., 331; Villars *v.* Palmer, 67 id., 204 (mere delay to sue not a discharge); Stearns *v.* Sweet, 78 id., 446; Myers *v.* First Nat. Bank, 78 id., 257; Wittmer *v.* Ellison, 72 id., 301, how available in debt upon specialty.

This note was indorsed as follows:

"Received one hundred dollars, being the interest to February 9, 1862. GEO. DOW."

"CHICAGO, *March 8, 1862.* Received, on within, one hundred dollars. GEO. DOW, per HENRY DOW."

"CHICAGO, *April 16, 1862.* Rec'd on the within, one hundred dollars. GEO. DOW, per HENRY DOW."

A default was taken against Vane and Stone; but Woolford set up in defense that the note was signed by him as surety only, of which fact Dow had notice; and that he had been discharged from liability as such surety by an agreement for the extension of the time of payment entered into between the said Dow and said principals without his, the surety's, consent, the nature of which agreement is sufficiently stated in the opinion.

The judgment below was for the plaintiff, with $916.05 damages.

E. G. Asay, for appellant. *A. E. Walcott*, for appellee.

[428*] *WALKER, C. J. The question presented by this record is whether time for the payment of the note was extended, by a binding agreement with the principal debtor, without the consent of the security. If such was the case, then the latter was released from all liability, unless he subsequently ratified the agreement. Does the evidence in the case prove such an extension of time for payment? The note was due six months from its date, with ten per cent. interest. Vane and Stone, in their answer to the bill of discovery, state that defendant in error, after the note matured, agreed with them to extend the time of payment if they wanted, and pay ten per cent. interest and one hundred dollars each month, in liquidation of the note, until it should be paid. It will be perceived that they state no new consideration to sustain the agreement, if any was made. The note, by its terms, drew ten per cent. interest, and this agreement made no change in

its terms as to the rate of interest. A credit is indorsed on the note, of one hundred dollars for interest, to the ninth day of February, 1862, but it does not appear to have been paid in advance. For aught that appears, it was paid on that day, and if so, it was then due. Had this interest been paid in advance, it would have constituted a consideration for the agreement. But so far as this record discloses the agreement to extend time for payment, if any was made, was a mere *nudum pactum.*

Henry Dow testified that he had the note in his possession from the latter part of February until sometime in May, for collection. That during that time, he had several interviews with Vane in reference to its payment, in none of which did he claim that any such agreement existed. That about the time witness placed the note in the hands of an attorney, that suit might be brought, Vane came to witness and offered him ten dollars if he would not institute legal proceedings on the note. If this evidence can be credited, and the witness was disinterested, and seems to have testified fully, fairly, [429*] and with *apparent candor, it contradicts the answers of Stone and Vane when they say time was extended. If such an agreement existed, why was it not insisted upon when suit was threatened? Again, the answers fail to give time, place and circumstances attending the transaction, and have every appearance of loose conversations, as to what the principal debtors could do in the way of making payments.

The note, when read in evidence, made out the case for defendants in error. To prevent a recovery, it required plaintiff in error to establish his defense. And upon a careful examination of the evidence, we think that he has failed, even if the answers of Stone and Vane to the bill of discovery should be considered, without reference to that of defendant in error.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

Seth W. Gordon vs. Robert Goodell.

Nonsuit: *Plaintiff has a right to submit to, if applied for in time.*

Under section 29 of the practice act (Rev. Stat. 1845, 417), providing that "every person desirous of suffering a nonsuit on trial shall be barred therefrom, unless he do so before the jury retire from the bar," a plaintiff has, by implication, a clear right to suffer a nonsuit on trial if he makes his motion in time.[1]

Same: *Same.*

When, therefore, a judgment by confession had previously been entered in vacation on the cause of action then on trial, by virtue of a warrant of attorney; and pleas had been put in by defendant by leave of court, without, however, vacating the judgment which was held for plaintiff's security; and the plaintiff, after the evidence was closed and before the cause was submitted to the jury, asked leave to take a nonsuit, which was refused: *Held*, that the motion for leave to take a nonsuit being in time, should have been allowed, notwithstanding the judgment.

Judgments by Confession: *Right of plaintiff to have vacated.*

A judgment entered in vacation by confession under a warrant of attorney, being for the plaintiff's benefit, he is entitled, upon the trial of the issues joined upon pleas (which the defendant is subsequently allowed to put in), and before the cause is submitted to the jury, to have the same vacated on his motion, and the parties remitted to their original positions. Submitting to a nonsuit will operate to vacate the judgment, as that rests on the recovery on the issues made up in the cause.

Same: *Held for plaintiff's security upon defendant's being allowed to plead.*

Where, after the entry of a judgment by confession under a warrant of attorney, the defendant is allowed to plead, the usual practice is not to vacate the judgment, but to hold the same for the security of the plaintiff till after the trial of the issues joined in the cause.

Practice: *Objections to competency of a witness can not be taken for the first time by instructions to the jury.*[2]

Where, upon the trial of an issue upon the question of usury, the defendant was permitted, without objection, to testify generally on his own

[1] See Amos *v.* Sinnot, 4 Scam., 440; Ross *v.* Chicago, 12 Ill., 366; Howe *v.* Haroun, 17 id., 494; Adams *v.* Shepard, 24 id., 464.

[2] See Frink *v.* McClung, 4 Gilm., 569; Moshier *v.* Knox College, 32 Ill., 155; Lockwood *v.* Mills, 39 id., 602; Phy *v.* Clark, 35 id., 377; Cooke *v.* Orne, 37 id., 186; Swift *v.* Castle, 23 id., 209; Fash *v.* Blake, 38 id., 363; Corgan *v.* Anderson, 30 id., 95; Thomas *v.* Dunaway, 30 id., 373; Goodrich *v.* Hanson, 33 id., 499.

behalf as to other facts than that of usury: *Held*, that the plaintiff could not thereafter put his objections to such testimony in the form of instructions to the jury that defendant was an incompetent witness, and that his testimony as to such other facts should be disregared; nor could he object thereto upon error.

Error to Circuit Court of *Kankakee* County.

In this cause the plaintiff in error, as assignee of two promissory notes executed by defendant in error, having, by virtue of the warrants of attorney thereto attached, entered a judgment thereon by confession against defendant in error for $468.11, and the defendant in error, having been allowed by the court to plead, which he did by pleading the general issue and special pleas setting up usury as to both of said notes, which was denied by plaintiff in error, who, in reply, set up that he was a *bona fide* assignee thereof, without notice and before their maturity, the cause came on for trial, and defendant, without objection, having testified generally in the cause as to other matters than usury, the following instructions were requested by the plaintiff and refused by the court:

1. That defendant was an incompetent witness to prove the time of assignment of said notes to plaintiff, and plaintiff's knowledge of what constituted the original consideration for said notes; and, there being no evidence in the cause as to the time of such assignment, or plaintiff's knowledge of the original and usurious consideration, a verdict should be returned for plaintiff for the full amount of the judgment by confession.

2. That defendant was incompetent as a witness in his own behalf to prove when said notes were assigned; and that his testimony, so far as it related to the time of their assignment to plaintiff, should be disregarded by the jury, and that if the time of said assignment was not proved by other testimony than that of defendant, a verdict should be found for plaintiff.

Verdict and judgment for plaintiff for the sum of $103, the judgment by confession being reduced to that amount.

The remainder of the case and the questions raised upon error are sufficiently stated in the opinion.

Gookins, Thomas & Roberts, for plaintiff in error. *Thomas P. Bonfield*, for defendant in error.

Breese, J. *Among the errors assigned on this rec- [435*]
ord which we deem material to notice are the following: In refusing plaintiff's motion for leave to submit to a nonsuit; in refusing his motion to vacate the judgment, and in refusing certain instructions asked for by the plaintiff.

The record shows a regular trial, pending before a jury, on issues made up by the parties. After the evidence was closed and before the cause was submitted, the plaintiff asked leave to take a nonsuit, which the court denied and exception taken.

By our practice act it is provided that every person desirous of suffering a nonsuit on trial shall be barred therefrom, unless he do so before the jury retire from the bar. Scates' Comp., 261, § 29. By implication most clearly, a plaintiff has a right to suffer a nonsuit on trial, if he makes his motion in time.

A judgment had previously been confessed on the cause of action then on trial, and the pleas put in by the favor of the court on the petition of the defendant, without however, vacating the judgment for which the defendant had also petitioned. This judgment was held for the benefit of the plaintiff, as his security, as is the usual practice. The plaintiff, when he entered the motion for leave to take a nonsuit, also entered his motion to vacate this judgment, which the court also denied. The judgment being for the plaintiff's benefit, we see no reason why the court should not have vacated it on his motion, and by allowing the nonsuit remit the parties to their original positions. The motion to take a nonsuit being in time should have been allowed, notwithstanding the judgment. This nonsuit would have operated to vacate the judgment, as that rested on the recovery on the issues made up.

We think the court erred in denying the motion.

We see no error in refusing the instructions asked by the plaintiff, for the reason he made no objection on the trial to the testimony of the defendant. He permitted him to become

a witness generally, to prove other facts than the "fact of usury," and cannot now object, or put his objection in the form of instructions. For the reasons given, the judgment is reversed and the cause remanded.

Judgment reversed.

[436*] *Oscar Anderson and Richard R. Waugh vs. Henry Hapler.

Replevin: *Signification of "plaint" as used in the statute.*

The Revised Statutes of this state (chap. 88, sec. 5) provide that proceedings in an action of replevin shall be commenced by "*plaint*," and this word has the same meaning that it had regarding proceedings under the statute of Marlbridge, 52 Hen. II, ch. 21. It signifies that there is to be a complaint made that the goods or chattels were wrongfully taken or are wrongfully detained; and this plaint mentioned in the statute is made by means of the affidavit required to be filed by or on behalf of the plaintiff. (See the proceedings at common law by original writ, and under the statute of Marlbridge by plaint, more fully explained in the opinion.)

Same: *For things severed from the freehold.*[1]

As the ownership of land draws to it the constructive possession, the owner can maintain replevin for chattels (wood in this case) severed from the freehold, where there is no adverse possession.

Same: *Same.*

But the owner of the land cannot maintain replevin for chattels severed from land in the adverse possession of the defendant, or of a third person, the law not permitting him to assert his title to the land against the person in adverse possession, in that manner.

Same: *Same.*

It seems that a landlord may maintain replevin for chattels wrongfully severed from the freehold by a tenant, as the title to the land is not thereby drawn in question.

Error to Circuit Court of *Putnam* County.

Replevin by defendant in error against plaintiffs in error

[1] See this subject considered and the cases concerning it collected in Ewell on Fixtures, 414 *et seq.*

for an alleged wrongful detention of about one hundred cords of wood.

Defendants pleaded, (1) *non detinet;* (2) that said wood did not belong to plaintiff; (3) property in Anderson, one of the defendants; (4) property in defendants.

On the trial the plaintiff showed a *prima facie* title in himself, acquired by him April 16, 1863, to the land from which the wood in question was cut; the cutting of the same therefrom by defendant Anderson, between April 22, 1863, and June 11, 1863; the piling thereof by said Anderson at Trenton, Bureau county, Ill.; and the possession thereof at the time of its replevy by defendants Anderson and Waugh.

Defendants then offered, for the purpose of showing color of title to said land, a tax deed thereof bearing date March 24, 1863, and duly acknowledged and recorded on the day of its date, and the certificates of purchase duly assigned to them, upon which said deed was executed; and offered to show a peaceable entry by them upon said land (which theretofore had been unoccupied), within three or four days thereafter, in good faith under said deed, and the retention of possession, and making of valuable improvements thereon; all which evidence having been excluded by the court, as also said tax deed and certificates when offered as evidence of an absolute title in defendants to said land, a verdict was found for the plaintiff.

A new trial was moved for on the ground that said evidence was erroneously excluded, and that the verdict was against the law and the evidence, which was overruled. A motion in arrest of judgment was also overruled, and it was stipulated that upon error, formal and technical questions should be waived and the cause decided on its substantial merits.

Burns & Cummins and *Bangs & Shaw*, for plaintiffs in error. *Milton T. Peters*, for defendant in error.

Beckwith, J. At common law the action of replevin was commenced by an original writ, issued out of the court of chancery, directed to the sheriff of the county where the goods and chattels to be replevied were, command- [438]

ing him to replevy and deliver them, and to cause the defendant to be brought to justice for their wrongful detention. An original writ was only issued at Westminster, and to remove the inconvenience of procuring one when required in a distant part of the kingdom, the statute of Marlbridge, [439*] 52 Hen. II, ch. 21, was passed, which provided *that if the beasts of any man were taken and wrongfully withholden, the sheriff might, after complaint made to him thereof, deliver them without "let or gainsaying," of him who took the beasts. The original writ was thus dispensed with, and a proceeding upon a complaint made to the sheriff under the statute was called a "proceeding by plaint."

The revised statutes of this state (ch. 88, § 5) provide that the proceedings in an action of replevin shall be commenced by *plaint*, and the word has the same meaning that it had regarding proceedings under the statute of Marlbridge. It signifies that there is to be a complaint made that the goods or chattels were wrongfully taken or are wrongfully detained. Our statute requires an affidavit to be filed by the plaintiff, or by some one in his behalf, stating that he is the owner of the property about to be replevied, or that he is then lawfully entitled to the possession thereof, and that the same has not been taken for any tax, assessment or fine levied by virtue of any law of the state, nor seized under any execution or attachment against the goods and chattels of such plaintiff, liable to execution or attachment. It is usual to state in the affidavit that the goods and chattels were wrongfully taken or are wrongfully detained, and in that manner the plaint mentioned in the statute is made.

It is a controverted question whether the action could be brought at common law for goods or chattels which had come lawfully to the possession of the defendant, and were only wrongfully detained. In New York it was held that an action lay only for goods or chattels unlawfully taken and detained; and in Massachusetts it was held to be a proper remedy for goods and chattels unlawfully detained, without reference to the mode by which the possession of the defendant

had been acquired. Our statute gives the remedy where the goods or chattels have been wrongfully distrained, or otherwise wrongfully taken, or shall be wrongfully detained. The possession of land was always a sufficient title thereto as against a stranger. The rightful owner could not forcibly enter and eject a disseizor, nor question his rights, excepting in a real or possessory action *for the recovery [440*] of the land. The possessor of lands might bring replevin for chattels severed from the freehold; and as the ownership of lands drew to it the constructive possession, the owner might bring replevin for chattels thus severed where there was no adverse possession. But the owner could not bring replevin for chattels severed from land in the adverse possession of the defendant, or of a third person. The law does not permit him to assert his title to the land, against the person in adverse possession, in that manner. Morris on Replev., 57, 58; 1 Smith's Lead. Cas., 485; 1 Chit. Pl., 163; *Eaton v. Southby*, Willes, 131; *Snyder v. Vaux*, 2 R., 427; *Vausse v. Russell*, 2 McCord, 329; *Mather v. Trinity Church*, 3 S. & R., 509; *Baker v. Howell*, 6 id., 476; *Brown v. Caldwell*, 10 id., 114; *Powell v. Smith*, 2 W., 126; *De Mott v. Hayeman*, 8 Cow., 220; *Davis v. Easeley*, 13 Ill., 192. Consistently with this rule a landlord might bring replevin for chattels wrongfully severed from the freehold by a tenant, as the title to the land is not thereby drawn in question. *Langden v. Paul*, 22 Vt., 205; *Sands v. Pfiefer*, 10 Cal., 258; *Sanders v. Reed*, 12 N. H., 558.

The judgment of the court is reversed and the cause remanded.

Judgment reversed.

James Kirk vs. Frederick Vonberg.

Jurisdiction: *Defined.*

Jurisdiction is defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and decide causes according to law, and to carry his sentence into effect.

Same: *Judgment lien, a part of the jurisdiction of circuit courts.*

The judgment lien created by statute, from the last day of the term, upon all the real estate of the judgment debtor in the county in which the circuit court wherein the judgment is rendered, is held, appertains to and is a part of the means of enforcing the sentence of the court; and hence is a part of the jurisdiction of the circuit court.

Municipal Court of Chicago: *Territorial extent of lien of its judgments.*

The act creating the municipal court of Chicago (Sess. Laws 1837, 75) gave it concurrent jurisdiction with the circuit court of all matters arising within the city, and provided (sec. 80) for the enforcement and collection of its judgments in the same manner as judgments of the circuit courts of the state; and the supplemental act of March 4, 1837 (Sess. Laws, 81), declared that it should have concurrent jurisdiction with the circuit court in all matters arising within the county. The judgments of the circuit courts being by statute liens upon all lands of the defendant within its jurisdiction, and the jurisdiction of the circuit court being co-extensive with Cook county: *Held*, that the judgments rendered by the municipal court were liens upon all of the lands of the judgment debtors within the limits of the county, although beyond the limits of the city of Chicago.

Judgment Liens: *Prior sale under a junior judgment will not affect the right of a subsequent purchaser under a prior judgment.*

A sale of land on execution issued on a junior judgment, although such sale is prior in point of time, will not affect the right of a prior judgment creditor to have his judgment satisfied by a sale of the same lands sold under the junior judgment, provided execution is issued on the prior judgment within a year from the last day of the term in which it was rendered, and a sale made within seven years.

Error to Superior Court of *Chicago.*

Ejectment by plaintiff in error against defendant in error for the recovery of the following described tract of land situated in Cook county, viz.: W. ½ of S. W. ¼ of Sec. 28, T. 36 N., R. 13 E.

The facts are stated in the following agreed case:

"It was agreed that Wm. B. Egan became the owner in fee of the premises, by purchase from the United States government, in February, 1836.

"Both parties derive title under judgments against said Egan, and execution sales under said judgments; and it was agreed that the parties each held or claimed title under proper mesne conveyances subsequent to the several execution sales, and that Vonberg was in possession of the premises at the commencement of this action.

"It was further agreed, that at the August term, 1837, of the circuit court of Cook county, Illinois, Buckner S. Morris recovered a judgment against said William B. Egan, for $677.80, and costs of suit, and that an execution issued on said judgment, directed to the sheriff of Cook county aforesaid, which was levied on the premises in question; and after being duly advertised, on the 27th day of December, 1837, the said premises were, by the sheriff, duly sold to Buckner S. Morris, the plaintiff in execution, who afterwards received a sheriff's deed of them; and the plaintiff, James Kirk, claims title under this sale to Morris.

"It was further agreed that, at the July term, 1837, of the municipal court of the city of Chicago, in said Cook county, Erastus Bowen recovered a judgment against said William B. Egan, for $364.15¼, and that an execution was issued on said judgment directed to the sheriff of said county, dated July 31, 1837, which was afterwards returned by said sheriff 'no property found on which to levy;' and that afterwards an alias execution was issued from said court, dated January 10, 1839, directed to the sheriff of said county, and which was duly levied on said lands on the 16th day of January, 1839; and that on the 15th day of March, 1839, the said sheriff duly sold said premises, under and by virtue of said execution, to said Bowen, who, in due time, received a sheriff's deed of the same; and that under this levy and sale, defendant Vonberg claims title to the lands in controversy.

"It was also agreed that the July term, 1837, of the muni-

cipal court of Chicago, adjourned before the August term, 1837, of the circuit court of Cook county was ended.

"Upon the foregoing facts the court found the issues for the said defendant, and rendered judgment in his favor; to which decision and finding of the court the said plaintiff then and there excepted; and the parties, plaintiff and defendant, do hereby agree that the foregoing agreed case may be filed with the clerk of said superior court, and by him certified to the supreme court of this state, at the April term, 1864, in and for the third grand division, as is by law provided."

Scammon, McCagg & Fuller, for plaintiff in error. *Goodrich, Farwell & Smith*, for defendant in error.

[446*] * WALKER, C. J. The question presented by this record is, whether the judgment in favor of Brown became a lien upon Egan's real estate beyond the limits of the city of Chicago, but within the county of Cook. It was recovered at the July term, 1837, and the judgment in favor of Morris was rendered at the following August term. If the land out of the city was subject to the lien of Brown's judgment, the prior sale under Morris' judgment could not affect that lien, as in that case, Morris' sale would be subject to the prior lien, and the sale could only confer the rights of a junior judgment creditor to the purchaser.

Was Brown's judgment a lien on Eagan's real estate beyond the limits of the city? The ninth section of the act creating the municipal court, Sess. Laws, 1837, p. 75, declares, that it shall have jurisdiction concurrent with the circuit courts of the state, in all matters civil and criminal arising within the limits of the city. The 78th section provides that when the defendants, or either of them, shall reside beyond the city limits, and in the county, the process shall be directed to the sheriff of the county, who is required to execute the same. Again, the 80th section provides that all judgments rendered by the court shall have the same lien on real and personal estate, and shall be enforced and collected in the same manner as judgments rendered in the circuit courts of this state.

These seem to be the only material provisions of this act, necessary to consider in determining this question. But by a supplemental act of the 4th of March, 1837 (Sess. Laws, 81), it is declared, that persons residing in Cook county may have recourse to that court, and that it shall *have [447*] jurisdiction concurrent with the circuit court in all matters arising within the county.

The act has provided for the inforcement and collection of the judgments of the court it had created, in the same manner as judgments of the circuit courts of the state. The mode of enforcing such judgments is by lien, by levy, and by sale of property. And the supplemental act declares, that the court shall have concurrent jurisdiction with the circuit court in all matters arising within the county. Then is a lien a part of the jurisdiction of a court of superior jurisdiction? Jurisdiction has been defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of, and decide causes according to law, and to carry his sentence into effect. 1 Bouv. Law Dic., 638. The various enactments of this state, have created a lien upon real estate in the county in which the circuit court is held, upon all real estate of the debtor, by the rendition of the judgment, from the last day of the term. This lien appertains to and is a part of the means of enforcing the sentence of the court, and hence is a part of the jurisdiction of the circuit court. It is a part of the power of enforcing the sentence pronounced according to law. And when the 80th section of the act declares that the municipal court shall have the same lien on real and personal estate as the circuit courts of the state, it only defines its jurisdiction with more precision than it had in conferring generally the jurisdiction exercised by the circuit courts of the state.

To ascertain the scope of the lien created in the eightieth section, we only have to ascertain the extent of the lien on real estate created by judgments in the circuit courts of the state. This court has held that judgments of the circuit courts, by the statute, are liens upon all lands of the defendant within their jurisdiction. *Bustard v. Morrison*, 1 Scam., 235. And

in that case it was also held that the jurisdiction of the circuit court is limited to the county in which the judgment is rendered, and no lien attaches beyond its limits. The jurisdiction of the circuit court being coëxtensive with Cook county, and the municipal court having concurrent jurisdiction, [448*] and the lien created *by its judgments being the same, the lien of the judgment recovered by Brown in the municipal court became a lien on all of Egan's property in the limits of the county. If this were not so, it would not be the same, but a different lien from that of the circuit courts of the state.

This judgment then becoming a lien on the defendant's property, coëxtensive with the lien of Morris' judgment in the circuit court, and the former being a first lien, and execution having been issued within a year from the last day of the term, and a sale being made within seven years, the sale was sufficient to, and did pass the title. The sale under Morris' judgment, although prior in point of time, was under a junior lien, and did not affect the rights of the purchaser under Brown's judgment. It did not affect his right to have his judgment satisfied by a sale of the same lands sold under Morris' junior judgment. *Rogers v. Dickey*, 1 Gilm., 636. There appears to be no error in this record, and the judgment of the court below is affirmed.

Judgment affirmed.

CHRISTIAN GINGRICH et al. vs. THE PEOPLE OF THE STATE OF ILLINOIS.

CONTINUANCE: *Of* scire facias *upon a forfeited recognizance to enable sureties to surrender their principal.*

Where a person charged with a crime entered into a recognizance with sureties to appear at the December term, 1862, of the circuit court, at which term his recognizance was declared forfeited for his nonappearance, and a *scire facias* ordered to be issued against the accused and his sureties, to which the sureties appeared and pleaded at the

April term, 1863, and the cause was then continued; and at the August term, 1863, the sureties moved for a continuance upon the affidavit of one of the sureties stating that on July 31st or August 1st, 1863, having procured certified copies of the recognizance and indictment of the principal, a power of attorney duly executed by his cosureties, and a letter from Gov. Yates of Illinois to Secretary Stanton, he went to Washington, D. C.; that owing to the strictness of the regulations adopted after the battle of Gettysburg and still in force, it was, as affiant was advised, useless to have gone sooner; that upon application to Secretary Stanton at Washington, an order to Colonel Hecker, in whose regiment in the army of the Potomac, the principal then was as a private soldier (he having, without the knowledge or consent of the sureties, enlisted before the forfeiture of his recognizance), directing him to surrender said principal, as well as any other authority for that purpose, was refused; that affiant was unable to obtain from the provost marshal, who alone had authority to grant it, a pass within the lines of the army of the Potomac; that said Gingrich being under military control, affiant was unable in any manner to obtain his arrest; that affiant had incurred great cost for that purpose and believed that said principal could be arrested and surrendered, if a continuance was granted, which was not applied for for delay: *Held*, that, reasonable diligence having been used to arrest and surrender the principal, and the sureties having acted in good faith in their efforts to take him, under the peculiar circumstances of the case and the condition of the country, the cause should have been continued.

SCIRE FACIAS UPON FORFEITED RECOGNIZANCE: *Enlistment of principal in army, not a defense, but merely ground for continuance.*

Where to a *scire facias* upon a forfeited recognizance the sureties pleaded that their principal, without their knowledge or consent, had, prior to the forfeiture of the recognizance, enlisted for three years in the United States military service and was still absent with his regiment and under the control of the military authorities in the state of Virginia, so that he could neither surrender himself nor be surrendered by his sureties, nor could custody of him be obtained by them by *habeas corpus* or otherwise, the court were inclined to think said plea presented no good defense, but showed ground for a continuance merely.

SAME: *Sickness of principal not a defense, but ground for continuance.*

Where to *scire facias* upon a forfeited recognizance the sureties pleaded that when said recognizance was forfeited and for a long time prior thereto and ever since that time, the principal was in the state of Virginia, sick and disabled, so that his sureties could not remove and surrender him without greatly endangering his life, the court were inclined to think that said plea did not present a good defense, but showed ground for a continuance merely.

SAME.

The *scire facias* in this case (which see at length in the statement of the case) was regarded as unobjectionable, and a model in like cases.

APPEAL from Circuit Court of *Woodford* County.

Scire facias against appellants upon a forfeited recognizance, the writ in question being as follows:

"STATE OF ILLINOIS — *Woodford County* — ss.

"*The People of the State of Illinois, to the Sheriff of said county, greeting:* Whereas, heretofore, to wit, on the second day of September, A. D. 1862, one Christian Gingrich was brought before Adino Page, Esq., one of the justices of the peace in and for said county of Woodford, and examined upon a charge of committing an assault with a sharp knife upon one Elizabeth Gingrich; and the said justice having inquired into the truth or probability of said charge, by the oath of all the witnesses attending, did order and require that said Christian Gingrich give bail, with good and sufficient security, in the sum of eight hundred dollars, for his appearance at the next term of the circuit court of said county of Woodford, on the first day of the term, to answer the said charge, and to do and receive what might be then and there enjoined upon him by the said court, and not depart the said court without leave.

"Whereupon, on the said second day of September, A. D. 1862, the said Christian Gingrich, as principal, and Charles Schneider, Jacob Gingrich, John Lutz and Frederick Donner, as sureties, personally came before said Adino Page, Esq., one of the justices of the peace in and for the county of Woodford aforesaid, and then and there, by their recognizance, in writing, by them duly signed and sealed, jointly and severally acknowledged themselves to owe and be indebted unto the people of the state of Illinois, the sum of eight hundred dollars, to be levied of their respective lands and tenements, goods and chattels; yet upon the condition, that if the said Christian Gingrich should personally be and appear before the circuit court of the county aforesaid, on the first day of the then next term thereof, and from day to day thereafter, until discharged by order of the said court, then and there to answer to the

said people on the said charge, abide the order and judgment of the said court, and not depart the same without leave, then the said recognizance should become void, otherwise should remain in full force; which said recognizance was then and there taken and approved by the said justice, and afterwards, to wit, on the fourth day of September, A. D. 1862, by him filed in the office of the clerk of the said circuit court and became a matter of record therein, as by the record of the said recognizance still remaining in the said court will appear.

"And whereas, afterwards, to wit, at the December term of the said circuit court, A. D. 1862, the grand jurors for the county aforesaid, preferred against the said Christian Gingrich and returned into the said court, on the ninth day of the said month of December, a certain bill of indictment, wherein it was presented, that the said Christian Gingrich, on the first day of September, in the year aforesaid, at the county aforesaid, with a certain knife made of steel, iron and horn, which he, the said Christian Gingrich, in his right hand then and there had and held (the blade of the said knife then and there being of the length of three inches and of the width of half an inch) in and upon one Elizabeth Gingrich, did make an assault with an intent her, the said Elizabeth Ginrich, then and there, feloniously, willfully and of malice aforethought, to kill and murder; which said assault, in the said indictment charged, is the same assault in the said recognizance mentioned.

"And whereas, afterwards, to wit, at the said December term of the said Woodford county circuit court, A. D. 1862, the same being the first term of said court next succeeding the date of the aforesaid recognizance, and the said court being then judicially sitting, the said Christian Gingrich was three times solemnly called, yet he came not, but made default; and the said Charles Schneider, Jacob Gingrich, John Lutz and Frederick Donner were each likewise three times solemnly called to bring into court the body of the said Christian Gingrich, yet they came not, but likewise made de-

fault, and failed to bring into court the body of the said Christian Gingrich.

"Whereupon, it was considered and adjudged by the said court that the said recognizance be taken for and declared forfeited, and that a *scire facias* issue against the said Christian Gingrich, Charles Schneider, Jacob Gingrich, John Lutz and Frederick Donner. These are, therefore, to command you that you make known to the said Christian Gingrich, Charles Schneider, Jacob Gingrich, John Lutz and Frederick Donner that they and each of them personally be and appear before our circuit court to be holden in and for the county aforesaid, at Metamora, on the second Monday of April, A. D. 1863, then and there to show cause, if any they may or can have, why execution should not issue against them upon their aforesaid recognizance, according to the form, force and effect thereof, and of the forfeiture aforesaid; and have you then there this writ, with a return of your doings thereon.

"Witness, James D. Perry, clerk of our said court, and the seal thereof, at Metamora, this 18th day of February, A. D. 1863.

"[SEAL] JAMES D. PERRY, *Clerk.*"

This *sci. fa.* was duly served upon all the sureties, who filed pleas thereto at the April term, 1863, and the cause was thereupon continued.

July 1, 1863, an *alias* writ of *sci. fa.* returnable at the the August term, 1863, was issued to bring in Christian Gingrich, but service could not be had.

The pleas filed by the sureties were: (1) *Nul tiel record.* (2) No such recognizance as that described in the writ. (3) That the person who took said recognizance was not a justice of the peace. (4) That said Christian Gingrich had died in the state of Virginia. (5) That said Christian Gingrich, without their knowledge or consent, enlisted September 8, 1862, for three years as a private in the United States military service, and on October 5, 1862, went with his regiment, then ordered to the state of Virginia, where he still remained under the control of the military authorities, so that he could not

either surrender himself nor be surrendered by his sureties, nor could the custody of said principal be obtained by them by *habeas corpus* or in any other manner. (6) That when said recognizance was forfeited, and for a long time prior thereto, and ever since that time, said principal was in Virginia sick and disabled, so that his sureties could not remove and surrender him without greatly endangering his life.

Upon the first four pleas issue was taken, and a general demurrer sustained to the fifth and sixth, the defendants abiding by said last mentioned pleas.

Defendants' attorney filed his affidavit for a continuance, stating what diligence the sureties had used and were still using to procure the arrest and surrender of said Christian Gingrich, who was then in the army of the Potomac as a private soldier in the regiment of Col. Hecker; and that one of their number, with the papers below mentioned, including a certificate as to the time of holding the court, was then absent for that purpose. Said surety having returned, his affidavit for a continuance was filed on the 14th of August, 1863, stating that he obtained certified copies of the recognizance and indictment of said principal, a power of attorney duly executed by his co-securities, and a letter from Governor Yates, of Illinois, to Secretary Stanton, and on July 31, or August 1, 1863, went to Washington, D. C.; that owing to the strictness of the regulations adopted subsequent to the battle of Gettysburg, and still in force, it was, as affiant was advised, useless to have gone at an earlier day; that upon application to Secretary Stanton, at Washington, an order to said Colonel Hecker directing him to surrender said Gingrich, as well as any other authority for that purpose, was refused; that affiant was unable to obtain from the provost marshal, who alone had authority to grant it, a pass within the line of the army of the Potomac; that, said Gingrich being under military control, affiant was unable, in any manner, to obtain his arrest; that affiant had incurred great cost for that purpose, and believed that said principal could be arrested and surrendered if a continuance

was granted, and that a continuance was not moved for for the purpose of delay.

The defendant's motion for a continuance was denied; and being forced to proceed with the trial the jury found a verdict against them.

Motions for a new trial and in arrest of judgment, upon the latter of which defendants claimed that the writ of *sci. fa.* was null and void and did not show that the plaintiff had a right to execution, were successively overruled and judgment rendered for the people.

The errors assigned are

(1) In sustaining said demurrers.

(2) In refusing a continuance.

(3) In not arresting the judgment.

M. Williamson, for appellants. *D. P. Jones*, State's Attorney, for the People.

[456*] *Breese, J. Under the peculiar circumstances of this case and the conditions of the country, the cause should have been continued on the affidavits on behalf [457*] of the defendants. It seems from them, *they did all that could be expected of them, to take and surrender the principal to answer the indictment. He had enlisted in the army without the knowledge or consent of his sureties, and they had used reasonable diligence to arrest and surrender him. They seem to have acted in good faith in their efforts to take him.

We are inclined to think the fifth and sixth pleas presented no good defense, but show ground for a continuance merely. Under such facts it would be unjust to condemn the defendants, without giving them the fullest time to produce their principal.

The *scire facias* is wholly unobjectionable, and might be well referred to as a model in like cases.

The judgment is reversed, and the cause remanded.

Judgment reversed.

MARY M. and IRWIN B. DOOLITTLE vs. WILLIAM DON MAUS.

ESTOPPEL: *By decree of partition.*

The defendant in a suit for a partition, in which the premises in controversy are set off to the complainant in partition, cannot maintain ejectment against one claiming under such complainant. The judgment or decree of a court having jurisdiction binds the parties, and is available to all persons claiming under either of them.

ERROR to Circuit Court of *Tazewell* County.

Ejectment by plaintiffs in error against defendant in error, in which judgment in the court below was rendered for defendant.

The case is sufficiently stated in the opinion.

Cooper & Moss, for plaintiffs in error. *B. S. Prettyman*, for defendant in error.

BECKWITH, J. This is an action of ejectment to recover [458] a quarter section of land in Tazewell county. The plaintiffs claim title as heirs of Irwin B. Doolittle. The defendant introduced in evidence the record of a judgment against Irwin B. Doolittle, an execution issued thereon, the sheriff's return thereto, and a sheriff's deed of the premises to William B. Doolittle, dated March 6, 1849. The defendant also offered in evidence the last will and testament of William B. Doolittle, proved July 27, 1854, by which he devised his estate in four equal undivided parts, viz.: To the children of Irwin B. Doolittle, deceased, one-fourth part; to Amaziah B. Doolittle one-fourth part; to George W. Doolittle, one-fourth part, and to the children of Rawley D. Doolittle, one-fourth part. The defendant also offered in evidence the record of a judgment rendered in 1855, in a suit for partition, wherein Amaziah B. Doolittle and others were plaintiffs, and the plaintiffs in this suit, and others, were defendants, by which the premises in controversy were set off to Amaziah B. Doolittle, under whom the defendant claimed title. The judgment in the suit for partition vested the title to the premises in controversy in

Amaziah B. Doolittle, and the plaintiffs are estopped from asserting to the contrary as against him and all persons claiming under him. It is well settled that the judgment of a court having jurisdiction binds the parties, and is available to all persons claiming under either of them.

Various objections were made in the court below to the judgment, execution and sheriff's deed, under which William B. Doolittle derived title. As the plaintiffs are estopped from asserting any title to the premises against Amaziah B. Doolittle and those claiming under him, it is entirely immaterial whether William B. Doolittle had any title or not. This view of the case renders it unnecessary to consider any of the objections made.

The judgment of the court below is affirmed.

Judgment affirmed.

[459*] *The United States Express Company vs. Joseph H. Bedbury.

Garnishment: *By what name defendants are to be described.*

Under the seventh section of the attachment act (Rev. Stat., 1845, 65; Scates' Comp., 229), declaring that in original attachment proceedings defendants may be designated by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles or titles as they are usually known; and the statute (Rev. Stat. 1845, 307, sec. 38; Scates' Comp., 549) providing for the garnishment of the creditors of judgment debtors, declaring that the court may proceed against garnishees in the same manner as is required by law in original attachment suits, it is sufficient if the defendants are described in the garnishee proceedings by their firm name, by the style or title by which they are known. In this case, the defendant was known and garnished by the style, The United States Express Company, and it was *held* that, if they composed a partnership, they were properly sued, and if a corporation, the designation was correct.

Incorporation: *Implied by appearing to a suit by the name, "United States Express Company."*

Where garnishee process was served upon "The United States Express

Company," as a creditor of a judgment debtor, the return stating that the president of the company not residing in the county in which the suit was pending, the writ was served upon the company as garnishee, by reading and delivering a copy thereof to H. C. & J. C. F., agents of the company, and on D. B. C., their clerk: *Held*, that, if the company was a corporation, the service was sufficient; and the garnishee having appeared by the above name, it was *held* that this was a sufficient admission that such was its name, and that the name itself imported that it was a corporation.

PRACTICE: *Diligence required to warrant setting aside default.*

Where, upon an application to set aside a judgment by default against a garnishee, it appeared that the garnishee employed an attorney to prepare the answer to the interrogatories filed, who, by mistake as to the court in which the answer was required to be filed, was absent, in attendance on business in the supreme court, when the default was taken; and the garnishee, after retaining the attorney, gave no further attention to the matter; but it did not appear that the garnishee gave any information or directions to the attorney, as to the preparation of the answer, it was considered that (aside from the fact that setting aside a default was matter of discretion) sufficient diligence in preparing his defense had not been shown to warrant setting the judgment aside.

SAME: *Vacating judgments by default, a matter of discretion.*

Whether a judgment by default against a garnishee shall be set aside and the party permitted to make a defense, is a matter resting alone in the sound discretion of the court, and not reviewable upon error.[1]

ERROR: *Matters of discretion not reviewable on.*[2]

Matters resting in the discretion of the court below, as setting aside a judgment by default, are not to be reviewed or corrected on error.

APPEAL from Superior Court of *Chicago*.

Garnishee proceedings in the court below by appellee against appellant, as garnishee of H. H. Knights.

[1] See Harmison *v.* Clark, 1 Scam., 131; Garner *v.* Crenshaw, id., 143; Wallace *v.* Jerome, id., 524; Gillet *v.* Stone, id., 539; Woodruff *v.* Tyler, 5 Gilm., 457; Chicago *v.* Adams, 24 Ill., 492; Mitchel *v.* Chicago, 40 id., 174; Hovey *v.* Middleton, 56 id., 468; Fergus *v.* Garden City Manuf'g Co., 71 id., 51; Powell *v.* Clement, 78 id., 20.

See, however, Rich *v.* Hatheway, 18 Ill., 548; Oetgen *v.* Ross, 36 id., 335; Bowman *v.* Wood, 41 id., 203; Bell *v.* Nims, 51 id., 171; Scales *v.* Labor, id., 232; Souerbry *v.* Fisher, 62 id., 135; Freiboth *v.* Mann, 70 id., 523; Union Hide and Leather Co. *v.* Woodley, 75 id., 435.

[2] See Crain *v.* Bailey, 1 Scam., 321; and the cases cited *supra* in note 1.

The case is sufficiently stated in the opinion.

Bates & Towslee, for appellant. *Herbert, Rich & Shepherd*, for appellee.

[465*] *WALKER, C. J. It is insisted as a ground of reversal that there is nothing in the record to show that [466*] plaintiff in error was a corporation; *and if there is no such evidence, the presumption should be that it is a copartnership. And if it was a copartnership, that the suit should have been against the individuals composing the firm. That it is irregular to sue a firm by its partnerthip name. The seventh section of the attachment act, Scates' Comp., 229 [Rev. Stat. 1845, 65], declares, that in original attachment proceedings defendants may be designated by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles, or titles as they are usually known. Whatever may be the common law governing such cases, this act has made it sufficient, if the defendants are described by their firm name, by the style or title by which they are known. In this case the plaintiffs in error are known by the firm name, the style or the title by which they are sued.[1] If they compose a partnership, they are properly sued, if a corporation the designation is correct; so no error is perceived in the description by which plaintiffs in error were sued, whether they are a corporation or only a partnership.

It is insisted that the service of the garnishee process upon the company was insufficient to sustain the judgment. By the amended return, it appears that if plaintiffs in error is a corporation the service was sufficient, and in strict compliance with the statute. It states that the president of the company not residing in the county in which the suit was pending, the writ was served upon the company as garnishee, by reading and delivering a copy thereof to Henry Colvin and James

[1] The appellant was, in the affidavit for the garnishee process, styled "The United States Express Company, so-called," and in the return and other proceedings, simply as "The United States Express Company."

C. Fargo, agents of the company, and on D. B. Cook, their clerk.

This, then, presents the question whether this is a corporation. Plaintiff in error appeared to the suit by the name of the "United States Express Company," and this is a sufficient admission that such is their name. In the case of *Henriques v. Dutch West India Company*, 28 Raym., 1535, it was held, that the name of the company imported a corporation. And the same rule has been announced or recognized in the courts of New York in the case of *Stoddard v. Onondaga Conference*, 12 Barb., 570; *Kennedy v. Cotton*, 28 id., 62.

These cases show that such a name imports a corporation. *It seems to comport with reason, that when [*467] an association of persons assume a name, which implies a corporate body, and exercise corporate powers, they should not be heard to deny that they are a corporation. When they do act and contract they are estopped from denying their corporate liability.

The first section of the act providing for garnishee proceedings, declares that the court may proceed against garnishees in the same manner as is required by law in original attachment suits.[1] It then follows, that the service being sufficient under the seventh section of the attachment act, it must be so held in this proceeding. There was no want of jurisdiction, because of the absence of sufficient service upon the company.

It was likewise insisted that the court below erred in refusing to set aside the judgment by default against the garnishee. Process was duly served, a conditional judgment was entered, interrogatories filed, the company failed to answer and a judgment by default was entered. Application was afterwards made to set aside this judgment on affidavits, in which it was alleged that an attorney was employed to prepare the answer, who was absent when the default was taken, in attendance on business in this court. That he was mistaken as to the court in which the answer was required to be made, and thus omit-

[1] Rev. Stats. 1845, 307, sec. 38, Scates' Comp., 549.

ted to file it as he intended and would otherwise have done. The agent of the company swears that he retained the attorney, and afterwards gave no further attention to the matter, and left immediately after he was served for New York city, on business, and did not return for some five weeks afterwards.

He fails to state that he gave any information or directions to the attorney as to the preparation of the answer. It is not diligence for a party merely to retain counsel to prepare an answer to interrogatories, propounded to, and which are required to be answered by the party himself, and under oath. The company, we think, fails to show diligence in preparing their defense. But even if this were not so, it rests alone in the sound discretion of the court whether a judgment by default shall be set aside and the party permitted to make a defense. And if satisfied that justice required it, the [468*] court *below should have set it aside. This is the well recognized rule, and is of uniform application. Being a matter of discretion in the court below, this court will not review or correct its decision on error.

No error is perceived in this record, and the judgment of the court below is affirmed.

Judgment affirmed.

CHARLES D. SANFORD vs. SAMUEL J. EMORY'S ADMINISTRATOR.

VENDOR AND PURCHASER: *Time of tender of deed is material at law.*

Where one party sells land to another and agrees to convey the same as soon as he can make title, at which time a certain payment is to be made and a bond and mortgage given for the unpaid purchase money, in a proceeding at law by the vendor to recover the amount agreed to be paid, the time of executing and tendering the deed is material. In such case, in order to put the vendee in default it is the duty of the vendor, within a reasonable time after the day when he is able to make title, to tender the deed.

SAME: *Right to a specific performance as affected by time.*[1]

Where the vendor agreed to convey as soon as he was able to make title, at which time the vendee was to make a payment and execute a bond and mortgage for the unpaid purchase money; and the vendor was able to make title at any time after November 18, 1856, and did not tender a deed till January 30, 1859, neither did the vendee at any time notify the vendor that he was ready to comply with the contract on the execution of a deed; it was considered that neither party was in a position to compel a specific performance.

CONTRACTS: *Rescission of contract for sale of land; notice.*

Where one party fails in performing the contract at the proper time, the other, if he means to rescind it, should give a clear notice of his intention.[2] It does not follow that because neither party is in a position to compel a specific performance, the contract is therefore rescinded.

SAME: *Rescission must be mutual.*

The rescission should be mutual, so as to discharge the vendor as well as the vendee.

SAME: *Same.*

Where the vendor agreed to convey as soon as he was able to make title, at which time the vendee was to make payment and execute a bond and mortgage for the unpaid purchase money; and the vendee was able to make title at any time after November 18, 1856, but did not tender a deed till January 30, 1859, but the vendee soon after making the contract went into possession and erected a building on the premises and had not surrendered the possession when the deed was tendered: *Held*, in an action at law for the purchase money, that before the vendee could rescind, he was bound to restore or offer to restore the property, and that he had no right to claim all the benefits of the contract and at the same time insist it was rescinded.

ERROR to Circuit Court of *Whiteside* County.

The case is sufficiently stated in the opinion.

James McCoy, for plaintiff in error. *Teller & Wood*, for defendant in error.

BREESE, J. Defendants' intestate agreed, on the [473] 14th day of February, 1856, with the plaintiff in error as follows:

Article of agreement made this 14th day of February, 1856,

[1] See Milnor *v.* Willard, *ante*, 38.

[2] See Ross *v.* Chicago, B. & Q. R. R. Co., 77 Ill., 127.

between C. D. Sanford, as agent for the sale of town lots, in the town of Round Grove, Whiteside county, and state of Illinois, of the first part, and Samuel Emory, of the county and state above written, of the second part, witnesseth: That the party of the first part does hereby agree to sell unto the second party the following town lot, in said town of Round Grove, known and numbered as follows: Lot two (2), in block fourteen (14), the condition for the purchase of which is the sum of two hundred (200) dollars, to be paid in the following manner: One-fourth of the above amount to be paid when the proper papers are made by deed; a bond and mortgage to be given in return, by the second party to secure the unpaid balance; is to be divided into three equal payments, and payable in six (6), twelve (12), eighteen months; ten per cent. interest from date until paid; said conditions to be complied with as soon as said C. D. Sanford, as agent, can safely [474*] make *title of said property, being now in part connected with the unsettled estate of John A. Holland, of Rockford, deceased; which said estate is now being settled with reference to perfecting title, so that said C. D. Sanford may safely deed the same. C. D. Sanford, [seal.]

S. J. Emory, [seal.]

Emory, soon after, went into possession of the lot, built a corn crib on it, and occupied it for a year or more. The lot was not inclosed, and was near the railroad depot.

Emory having died, the plaintiff filed this agreement in the county court as a claim against the estate, which that court disallowed, and on appeal to the circuit court, it was also disallowed.

It was in proof in the circuit court, that on the 6th of January, 1859, the plaintiff and wife executed a general warranty deed for the lot to Emory, with the usual covenants, with the relinquishment of the dower of his wife, and duly acknowledged, which, on the 30th day of January, 1859, he tendered to Emory, when Emory said he did not want the deed — he would be up in a few days and settle.

It was also proved that on that day the value of the lot was not more than one hundred dollars.

It was further proved that it was in plaintiff's power to have made a deed conveying the title at any time after the 18th of November, 1856.

The question is, Was Emory bound to accept the deed when tendered?

The answer to this question involves the consideration of another, and it is this: Could Emory compel a specific performance of this contract if he had tendered the purchase money on the 30th of January, 1859? By the terms of the agreement the whole amount was due about the 18th of August, 1857. Sanford had it in his power to make the deed and demand the price on any day after the 18th of November, 1856, and had contracted to make it so soon as he was able. At law (and this was a proceeding at law), time is material. It was the clear duty of Sanford, in a reasonable time after that day to *tender the deed; for before the deed was deliv- [475*] ered Emory could not well execute the mortgage. Nor was he required to give his notes until the deed was made. To put Emory in default, then, the deed should have been tendered. This would have enabled Sanford to compel a specific performance.

To enable Emory to compel a specific performance, he should have, in a reasonable time after the 18th of November, notified Sanford that he was ready to comply with the contract on the execution of a deed. Neither party then has been in a position to compel a specific performance. Neither has shown himself ready, desirous, prompt and eager to perform.

But does it follow from this that the contract is rescinded? Can one party without notice to the other, or by some affirmative act, rescind a contract? The rule is, where one party fails in performing the contract at the proper time, the other, if he means to rescind it, should give a clear notice of his intention. 1 Sug. on Ven., 279; *Reynolds v. Nelson*, 6 Wend., 20.

Emory had taken possession of this lot, and erected a build-

ing on it, and before the deed was tendered, on the 30th January, 1859, he had not surrendered the possession. For aught that appears, his heirs are still in possession of the premises. When this tender was made, he did not notify Sanford that he had rescinded the contract, but said he did not want the deed, but would come up in a few days and settle, nor did he offer to surrender the possession of the lot. On the authority of the case of *Gehr v. Hagerman*, 26 Ill., 438, we are inclined to think that before Emory could rescind, he was bound to restore the property to Sanford, or offer to restore it. The contract was in existence, and if the premises appreciated in value, Emory might at some future day claim its performance. He has no right to claim all the benefits of the contract, and at the same time insist it is rescinded. The rescission should be mutual, so as to discharge the vendor as well as the vendee. *Teter v. Hinders*, 19 Ind., 93; *Johnson v. Houghton*, id., 259; *Bank of Columbia v. Hager*, 1 Peters, 455.

The judgment must be reversed and the cause remanded.

Judgment reversed.

[476*] *Ezra B. McCagg et al. vs. William O. Heacock et al.

Statute of Limitations: *Color of title; deed from mortgagor to mortagee in satisfaction of the debt.*

Where the mortgagor in a mortgage executed Oct. 25, 1836, conveyed a portion of the mortgaged premises to the mortgagee in satisfaction of the debt on July 1, 1840, and the premises so conveyed remained vacant and unoccupied from 1840 till January 13, 1853—during which time the mortgagee paid all taxes thereon — when he sold them to defendant, who soon after his purchase entered into and continued in possession; and on July 5, 1837, a third party recovered a judgment against the mortgagor, under which the mortgagor's interest in the premises was, on February 24, 1841, sold, and a sheriff's deed executed on the 13th of June, 1842, to the purchaser: *Held*, on a bill to redeem, filed February 11, 1854, by parties claiming under the sheriff's deed against the purchaser from the mortgagee, that the deed of July 1, 1840, from the mortgagor to the mortgagee, was color of title; and the grantee in such deed having had color of title, made in good faith (the conveyance having been made in payment of a just debt),

for more than seven years, and having during that time paid the taxes, his grantee acquired a complete bar.

SAME: *What constitutes color of title.*

Any instrument indicating an intention to pass a title to lands, of which a description is given, from one party to another, gives color of title to the lands described. For some reason such an instrument often fails to effect that intention, and passes only the color or semblance of a title. It makes no difference whether the instrument fails to pass a title because the grantor had none to convey, or had no authority in law or in fact to convey one. Inasmuch as the instrument fails to pass an absolute title, for the reason that the grantor was not possessed of one or more necessary requisites, it gives the semblance or color only of what its effect would be if they were not wanting.[1]

SAME: *Color of title presumed to have been acquired in good faith.*

The law presumes that all acts are done in good faith until there is evidence to the contrary; and color of title is presumed to have been thus acquired, till it is shown to have been acquired otherwise.[2]

SAME: *Good faith defined.*

The good faith required by the statute in the creation or acquisition of title is a freedom from a design to defraud the person having the better title.

SAME: *Notice of adverse claim, not evidence of bad faith.*

The knowledge of an adverse claim to or lien upon property does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien.

LEGAL PRESUMPTIONS: *Definition, nature of grounds of.*

Legal presumptions are rules established by the common law, or by statute, and are founded upon the first principles of justice or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things.

Where one fact is proved or ascertained, another, its uniform concomitant, is universally and safely presumed; it is this uniformly experienced connection which leads to its recognition by law without other proof. Many of these presumptions are conclusive because they have been found to be so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent from motives of public policy, for the sake of greater certainty, and the promotion of the quiet and peace of community, and, therefore, all opposing evidence is forbidden. In some cases

[1] See Brooks *v.* Bruyn, 35 Ill., 392 and note.

[2] See Brooks *v.* Bruyn, *supra* and note.

this common consent is declared through the medium of judicial tribunals as a part of the common law. In others, the conclusion from certain circumstances is declared by the legislature; and it is within the power of the legislature to extend such conclusions of law to such cases and to such circumstances as it may deem best for the public good. (See the opinion for an application of these principles to the general doctrine of limitation as applied to title to land.)

SAME: *Application to limitation law of* 1839.

In this country the taxes upon land are usually paid by the true owner; and after payment of the same for seven successive years under claim and color of title made in good faith, and after actual possession taken under such color of title, the presumption of ownership is so strong that the legislature, for the promotion of quiet and the peace of community, in its wisdom, declared it to be a legal conclusion from such circumstances, that the possessor was the true owner to the extent and according to the purport of his paper title.

ERROR to Superior Court of *Chicago*.

The case is sufficiently stated in the opinion of the court.

W. C. Goudy, for plaintiff in error. *A. Garrison*, for defendant in error.

[477*] *BECKWITH, J. This is a suit in equity by the widow and heirs-at-law of Reuben B. Heacock, to redeem seventeen lots of land in block 129 in school section addition to Chicago, from a mortgage dated October 25, 1836, executed by Russell E. Heacock and wife to Henry Van Antwerp. In the year 1838, a suit by *scire facias* was commenced to foreclose the mortgage, in which a judgment was rendered [478*] on the 16th of May, 1839, directing a sale of seven*teen of the lots mentioned in the mortgage; and it was released as to the remaining three lots. On the 1st day of July, 1840, Russell E. Heacock and wife conveyed the seventeen lots to Van Antwerp, in satisfaction of the debt. The premises remained vacant and unoccupied from 1840 until January 13, 1853, when Van Antwerp sold the same to McCagg, one of the plaintiffs in error; during which time Van Antwerp paid all the taxes thereon. McCagg entered into possession soon after his purchase, and was in possession when the suit was commenced on the 11th of February, 1854. On the 5th

of July, 1837, James Kinzie et al. recovered a judgment in the municipal court of Chicago against Russell E. Heacock, for $165.43, and under a *pluries fi. fa.*, which was issued thereon, and dated January 13, 1841, all the right, title and interest of the defendant therein was, on the 24th of February, 1841, sold to Reuben B. Heacock. There was no redemption from the sale, and on the 13th of June, 1842, the sheriff executed a deed to the purchaser. Russell E. Heacock died in 1849 intestate, and Reuben B. Heacock died in 1854 intestate, leaving the appellees (excepting Elizabeth Heacock, his widow) his heirs-at-law, who were also heirs-at-law of Russell E. Heacock. Pending the suit, McCagg filed a cross-bill, praying that the appellees might be decreed to release to him all claim which they might have to the premises.

We think it is unnecessary to discuss many of the questions raised in argument. The deed of Russell E. Heacock to Van Antwerp, dated July 1, 1840, was color of title. Any instrument, indicating an intention to pass a title to lands, of which a description is given, from one party to another, gives color of title to the lands described. For some reason, such an instrument often fails to effect that intention, and passes only the color, or semblance of a title. It makes no difference whether the instrument fails to pass a title because the grantor had none to convey, or had no authority in law or in fact to convey one. Inasmuch as the instrument fails to pass an absolute title, for the reason that the grantor was not possessed of one or more necessary requisites, it gives the semblance or color only of what its effect would be
if they were not wanting. For more than seven years [479]
from the time when Van Antwerp acquired his color
of title, the premises were vacant and unoccupied; and during all that time he paid all taxes assessed thereon. The law presumes that all acts are done in good faith until there is evidence to the contrary; and color of title is presumed to have been thus acquired till it is shown to have been acquired otherwise. The good faith required by the statute, in the cre-

ation or acquisition of color of title, is a freedom from a design to defraud the person having the better title.

The lands in controversy were conveyed to pay a just debt, and there was not even a suggestion of any fraud. The appellees do not seek to redeem as the heirs-at-law of Russell E. Heacock; and under the allegations of their bill they are not at liberty to insist that undue advantage was taken of his necessitous condition. They seek to redeem as the heirs-at-law of Reuben B. Heacock, under a title anterior in its origin to the deed to Van Antwerp; and, as heirs of Reuben B. Heacock, claiming under a title adverse to that of Russell E. Heacock, they have no right to inquire into the circumstances under which his deed to Van Antwerp was made.

But, after careful examination of the record, we are unable to discover circumstances which would entitle the appellees to relief as heirs of Russell E. Heacock. Three of the lots mortgaged were voluntarily released, and his indebtedness was canceled for the residue of them, and there is no evidence of any oppression, or undue advantage taken of him.

It was insisted in argument that Van Antwerp had notice of the judgment lien of Kinzie *et al.* upon the equity of redemption. The taking of a conveyance from Heacock with such notice was not a fraud upon Kinzie *et al.* It impaired none of their rights. The knowledge of an adverse claim to, or lien upon property, does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien. When this suit was commenced the grantee of Van Antwerp was in possession of the premises, and his grantor having had
[480*] *color of title, made in good faith, for more than seven years, and having, during that time, paid the taxes, the appellant McCagg acquired a complete bar.

The act of March 2, 1839, which was subsequently incorporated into the revised statutes of 1845, did not introduce a new mode of acquiring title, but applied to circumstances peculiar to an unsettled country, a mode of confirming titles as old as the common law itself.

Legal presumptions are rules established by the common law or by statute, and are founded upon the first principles of justice or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things.

Where one fact is proved or ascertained, another, its uniform concomitant, is universally and safely presumed; it is this uniformly experienced connection which leads to its recognition by law, without other proof. Many of these presumptions are conclusive because they have been found to be so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent from motives of public policy, for the sake of greater certainty and the promotion of the quiet and peace of community, and, therefore, all opposing evidence is forbidden.

In some cases this common consent is declared through the medium of judicial tribunals, as a part of the common law. Before the passage of the statute of West., 1 (3 Edw. I, ch. 39), the titles to lands and other rights were presumed from possession, or a *quasi* possession, from the time whereof the memory of man runneth not to the contrary. By that act, the period of legal memory was established to be the first day of the reign of Richard I (July 6, 1189), and titles to lands and incorporeal rights were established by legal conclusions drawn from circumstances existing during the period of time thus limited.

The statute 32 Henry VIII, barred the writ of right after sixty years, and by a legal conclusion drawn by the courts, the true owner was divested of his right of property, and the same *was vested in the disseizor. 3 Black. Com., [481*] 196. So the statute 21 James I barred the right of entry after an adverse possession of twenty years, and by a like conclusion the right of possession was vested in the disseizor. In each case the statute fixed the circumstances under which an action should not be sustained, and the legal conclusion therefrom was drawn by courts. The circumstances desig-

nated were such as the legislature thought proper to name, but other circumstances might have been named, as, for example, the payment of taxes or the rendition of knight service; or the time might have been more limited if the legislature had thought proper. It is undoubtedly within the power of the legislature to extend such conclusions of law to such cases and to such circumstances as it may deem best for the public good.

In this country the taxes upon land are usually paid by the true owner; and after payment of the same for seven successive years under claim and color of title made in good faith, and after actual possession taken under such color of title, the presumption of ownership is so strong that the legislature for the promotion of quiet and the peace of community, in its wisdom, declared it to be a legal conclusion from such circumstances, that the possessor *was* the true owner to the extent and according to the purport of his paper title.

The conclusion thus declared we are required to administer as a part of the law of the land.

The decree of the court below will be reversed, and a decree entered in this court dismissing the original bill and granting the prayer of the cross-bill.

Decree reversed.

Abraham J. Knisely vs. John P. Parker.

Attachments against Boats and Vessels: *A dredge-boat not within the law.*

The design of the act regulating attachments against boats and vessels (Rev. Stat. 1845, 71), and giving that remedy, for debts contracted for work, supplies or materials, etc., against "boats and vessels of all descriptions, built, repaired or equipped, or running upon any of the navigable waters within the jurisdiction of this state," was to give the remedy against vessels running upon our navigable streams and waters; and not against stationary structures. A dredge-boat, therefore, used in widening and deepening the harbor at Chicago is not within the meaning of the law.

JUDICIAL SALES: *Under judgment void for want of jurisdiction.*

A dredge-boat not being liable to attachment and sale under the act regulating attachments against boats and vessels (Rev. Stat. 1845, 71), a sale thereof under a judgment in such a suit, where there is no personal service on the owner, will be void for want of jurisdiction of the subject matter, and the purchaser will acquire no title thereby.

REPLEVIN: *Plaintiff may recover on his prior possession as against one wrongfully depriving him thereof.*

Where a dredge-boat was sold successively under two judgments in attachment, both void for want of jurisdiction, and the last purchaser took the boat from the possession of the purchaser under the prior sale: *Held*, that the purchaser from whose possession it was taken was entitled, upon issues joined on pleas of *non cepit* and property in defendant, to recover on his prior possession.

ERROR to Superior Court of *Chicago*.

Replevin for a dredge-boat and its machinery, brought by defendant in error against plaintiff in error.

Pleas *non cepit*, and property in defendant.

It appears that on November 1, 1860, a judgment was recovered by G. D. McDonald in an attachment suit against the steamboat known as the dredge "Nile," commenced by him before a justice of the peace, from which judgment an appeal was taken by the proprietor of the boat to the circuit court, where the appeal was subsequently dismissed with a *procedendo* to the justice of the peace, who issued an order of sale, under which, on October 26, 1861, the boat was sold to Knisely, who reduced it to his possession. Pending this appeal a judgment was, on December 12, 1860, rendered in the superior court of Chicago at the suit of one Dickerson and against said Knisely, in an attachment suit against said boat, and, on March 11, 1861, Parker became the purchaser of the said boat at the sale under the special execution issued February 11, 1861, on said judgment; and, upon Knisely's subsequently taking it from his possession as aforesaid, brought this action.

The parties respectively claimed under and offered in evidence the judgments in their favor respectively and the subsequent sales thereunder.

Verdict and judgment for plaintiff.

The question raised upon error is fully stated in the opinion.

Hoyne, Miller & Lewis, for plaintiff in error. *Cyrus Bentley*, for defendant in error.

[483*] *WALKER, C. J. This record presents the question, whether the dredge boat in controversy is of the class of vessels embraced in the provisions of the law regulating attachments against boats and vessels. The first section of the law declares, that "boats and vessels of all descriptions, built, repaired or equipped, or running upon any of the navigable waters within the jurisdiction of this state, shall be liable for all debts contracted by the owner or owners, masters, supercargoes or consignees thereof, on account [484*] *of all work done, supplies or materials furnished by mechanics, tradesmen and others, for or on account of, or towards the building, repairing, fitting, furnishing or equipping such boats and vessels, their engines, machinery, sails, rigging, tackle, apparel and furniture." The act also gives a preference to such debts, over all others owing by the owner of such vessel, except the wages of mariners, boatmen and others employed in the service of such boats, who shall be first paid. For such indebtedness, the second section gives the right to sue out an attachment. And it and the third section prescribe the steps to be taken in such a proceeding. The fourth section extends the benefit of the act to debts created for labor and service rendered by engineers, pilots, mariners, boatmen and others employed in any capacity in or about the service of any such boat or vessel, and authorizes them to proceed by attachment for the collection of such debts.

It is material to ascertain whether these provisions apply to everything which is characterized as a boat or vessel. It names boats and vessels of all descriptions as being embraced in the provisions of the act. This language, although broad and comprehensive, would not include a wharf boat, a skiff, canoe or a ferry boat. The term vessel, in its broadest sense,

would include hogsheads, barrels and a variety of domestic utensils, which are obviously not intended to be included in the provisions of this law. But when the scope of the act is considered, it seems that the design was to give the remedy against vessels running upon our navigable streams and waters. Such vessels as were not stationary. Vessels of that character are usually owned by nonresidents, or persons not generally known. To give a speedy and sure remedy for debts they might contract is wise and just. And this was, doubtless, the controlling reason for its enactment. Boats and vessels are usually employed in the transportation of persons and property from one place to another, and it would seem to be such vessels and not stationary structures, used as tenements or as machines that are embraced. The attachment in this case is against a dredge boat, used in widening and deepening the harbor of Chicago. *It is [485*] not capable of being used for the ordinary and general purposes for which boats and vessels are usually employed. It only floats upon the harbor, and contains machinery for excavating earth and removing obstructions. It is used simply as any other piece of machinery adapted to the purpose, and may be used on land as well as upon water.

A dredge boat may have an engineer to operate the dredging machine, but it has no officers usually employed on ordinary vessels, nor do such boats generally employ boatmen or seamen, and no one ever heard of a "captain," "crew," "supercargo" or "consignee" of a dredge boat. It has but few qualities, in its relations to the public, possessed by boats which run upon navigable waters. And it can hardly be presumed to be any more within the provisions of this act than a stationary wharf boat, yet its name is embraced within the language of the statute, but no more so than utensils of domestic use. A sail boat used alone for pleasure, and on which no officers or hands are employed, cannot be embraced within the provisions of the statute, although like a dredge boat it may, in terms, be enumerated in the statute. This dredge then not being liable to attachment and sale, neither party

acquired any title by their purchase, for want of jurisdiction of the subject matter, and no service being had on the owner, all the proceedings before the court in each case were void.

But plaintiff below was in the possession of the dredge, and it was wrongfully taken from him. He had the right to recover on his prior possession. The pleas were *non cepit*, and property in defendant, neither of which was sustained. Having taken possession under a void judgment and sale, the taking was wrongful, and gave no right to hold the property. Plaintiff in error likewise failed to show title in himself by producing the justice's record and evidence of sale, as it did not show that he thereby acquired any title. The judgment of the court below is affirmed.

Judgment affirmed.

[486*] *Charles Aulger vs. The People of the State of Illinois.

Challenge to Fight a Duel: *A letter inviting a challenge is not.*

A letter contained the following: "It appears that a nife is your feverite of settling fuses and if so bea the case you can con sider that it will sute me you are a Cowerd and darsent to except of my offer. i want the same chanse of sharpening mi nife you can set your day and I will be on hans * * come uplike a man chuse your man an I will chuse mine this thing must be setteld iam not a cowerd:" *Held*, that this was not a challenge to fight a duel, but seemed rather to invite one.

Error to Circuit Court of *Tazewell* County.

Indictment for sending a challenge to fight a duel, the letter, which was claimed to constitute the challenge, being as follows:

"July tet 8. 1862.

"Mr. Smith: Sir in regard to your prars tha have proven in vain your victom still lays befoar you yet aman ho professes to be a cristian and will come home and sharpen up

his nife and thake his boys along to see him murder a man do you call that a cristian act Your intention was to kill me and the mackinaw to rece mi boda you have sad that it wood be a grate deal beter for you if iwould di and I expect that it wood for if ihad of dide the boys would hugn you without jug or jura a man ho will bost of runing his nife into a man shose that he is a cristian you have said that you expected that you had got your self if into trubell and I would not wonder and you had but it appears that a nife is your faverite of setling fuses and if so bea the case you can con sider that it will sute me you are a Cowerd and darsent to except of the offer. i want the same chanse of sharpening mi nife you can set your day and I will be on hans I new nothing of your intention I did not no that you in tentended to murderme com uplike a man chouse your man an I will chuse mine this thing must be setteld iam not a coward a praing man a good exampell to set before his childrain takethem along to see him murder a man. Your frend Charles Aulger

"A. C. Smith You wanted to see me when I was about dead. I supose you wanted to no if yon had finoshed the sole now I will soon be abell to see you and fase you like a man."

The trial in the court below resulted in a conviction, and the defendant brought error.

E. C. Ingersoll and *S. D. Puterbaugh*, for plaintiff in error. *D. P. Jones*, State's Attorney, for the people.

Breese, J. There is no evidence in this record that [488] the defendant sent the letter to Smith. He admitted he wrote it, but not that he had sent it. As it was received by the hands of Andrew McGee, he should have been called to prove by what authority he bore it. If by defendant's authority or at his request, one part of the charge would have been established.

But the foolish and nonsensical letter of the wounded and infuriated German is not a challenge. It is absurd so to regard it. It is not an intelligible piece of composition, and in-

stead of giving a challenge, seems rather to invite one from the witness Smith.

The judgment is reversed and the cause remanded.

Judgment reversed.

ROBERT H. FOSS and BENJ. F. CARVER vs. CITY OF CHICAGO.

SURETIES UPON OFFICIAL BONDS: *Subrogation and discharge of.*

The act of February 14, 1855, incorporating the board of sewerage commissioners of the city of Chicago, and which was a public act, provided that the funds of the board should, at all times until disposed of, be kept deposited in such place or places of deposit as should, by an order of said board, be directed, provided, that such place or places of deposit should first be approved by the common council. The board selected the Marine Bank of Chicago, as a place of deposit for its funds, and reported its action to the mayor and common council, and thereafter deposits were made by the treasurer of the board with this bank, with the knowledge of the city. The act also provided that the funds thus held on deposit should be drawn out upon checks or drafts, regularly numbered, and payable to the person or persons for whose benefit they were intended, briefly specifying for what purpose or account they are drawn; and the act made the receiving or appropriating of any of its funds by any officer of the board, for his own use or benefit, embezzlement. The treasurer, in violation of said act, drew checks upon said bank which were not numbered, and which were payable to himself and others, or bearer, without specifying any purpose or account for which the same were drawn, upon which he obtained a large amount of money of said bank and appropriated it to his own use; he also hypothecated sewerage bonds with said bank to secure an individual note discounted for his accommodation, which bonds were sold in market and the proceeds applied in payment of said note. With full knowledge of all the facts, the treasurer then being a defaulter for the sum of $34,732.46, the city made a settlement with the bank, and executed it a formal release from all liability for deposits theretofore made with it, and brought suit upon the treasurer's official bond: *Held*, that although no formal approval appeared upon its minutes, it would be presumed that the common council approved of the place of deposit; that the provisions of the act relative to the designation and approval of the place of deposit, and the manner of drawing funds, were intended for the protection of the city as well as to direct the mode in which the business of the

board of commissioners should be transacted, it being intended that the city should have the benefit of the responsibility of the bailee with whom its funds were deposited, as security for their safe keeping; that the bank remained liable to the city for the funds improperly paid out by it upon such checks, drawn in violation of the law; that the treasurer's sureties had the right, upon the payment of their liability to the city, to be subrogated to its rights against the bank; and the city having discharged the bank from all claims for money deposited and paid out upon such illegal checks, and thereby deprived the sureties of their right to subrogation, the sureties were discharged from liability upon said bond so far as their right of subrogation was destroyed.

Error to Superior Court of *Chicago*.

Debt by defendant in error against plaintiffs in error and others, the trial of which resulted in a judgment for plaintiff for the penalty of the bond, dischargeable on payment of the damages assessed at $37,911.34.

The case is sufficiently stated in the opinin of the court.

F. H. Kales, for plaintiffs in error. *B. F. Ayer*, for defendant in error.

* Beckwith, J. This is a suit brought by the de- [489*]
fendant in error against Sylvester Lind, A. H. Heald,
and the plaintiffs in error upon Lind's official bond to the city of Chicago, for the faithful discharge of his duties as sewerage commissioner.

The act of the legislature incorporating the board [490]
of sewerage commissioners of that city, approved February 14, 1855, provided for the election of three persons as sewerage commissioners; one for the north, south and west divisions, respectively, who were officers of the city, but, for convenience in transacting business, were made a separate corporation under the name and style of the board of sewerage commissioners. The law required the board to appoint one of their number to act as its treasurer; and that each commissioner, before entering upon the duties of his office, should give a bond to the city, in such sum and with such surety as should be satisfactory to the common council thereof for the faithful performance of his duties. Lind was reëlected sew-

erage commissioner for the west division of the city on the 1st day of May, 1860, and the bond upon which the suit was brought was executed to secure the performance of his official duties from the time of his reëlection. The bond is dated May 23, 1860, and was presented to, and approved by, the common council on the 17th day of December, 1860.

Prior to May 1, 1860, Lind was treasurer of the board, and after that time continued to perform the duties of the office. By an act of the legislature, approved February 18, 1861, the board of sewerage commissioners was abolished after May 1, 1861, and its property and funds were transferred to the board of public works. The act of 1855 provided that the funds of the board should, at all times until disposed of, be kept deposited in such place or places of deposit as should by an order of said board be directed, provided that such place or places of deposit should first be approved by the common council. As early as 1856, the board selected the Marine Bank of Chicago as a place of deposit of its funds, and reported its action to the mayor and common council. From that time deposits were made with this bank with the knowledge of the city, and it may be presumed that the common council approved of the place of deposit, although no formal approval appears upon its minutes. *Bank of United States v. Dandridge*, 12 Wheat., 70.

The act further provided that the funds of the board [491*] thus *held on deposit should be drawn out upon checks or drafts, regularly numbered and payable to the order of the person or persons for whose benefit the same were intended, briefly specifying for what purpose or account the same were drawn.

And the act prohibited any of the officers of the board from directly or indirectly receiving or appropriating any of its funds, money or property, and from taking, pledging or borrowing any of said funds or property, for their own use or benefit, making such acts embezzlement. After Lind's reelection in May, 1860, he appropriated to his own use funds of the board, amounting to $6,805, drawn from the American

Exchange Bank, and $1,850.05, sewerage taxes collected. In further violation of the provisions of the act referred to, Lind drew checks which were not numbered, payable to himself and others, or bearer, without specifying any purpose or account for which the same were drawn, and upon which he obtained of the Marine Bank moneys amounting to $35,105.10, which he also appropriated to his own use.

He also hypothecated with the bank forty sewerage bonds, for the sum of $1,000 each, to secure an individual note, discounted for his accommodation. The bonds thus hypothecated were sold in market, and the proceeds applied in payment of the note which they were pledged to secure. The entire defalcation of Lind was $83,760.15, upon which he was entitled to a credit for moneys deposited in bank to the credit of the sewerage account, and for moneys paid to the city authorities, of $49,027.69, leaving a balance due from him of $34,732.46, for the recovery of which, with interest, this suit is brought.

The act referred to, requiring the funds of the board to be kept in some place of deposit designated by it, and approved by the common council, and prescribing the manner in which funds should be drawn therefrom, was a public one; and the bank was well aware of its provisions. It was well known that Lind was an officer of the city, whose powers and duties were prescribed by law; that the moneys deposited in the bank, in respect of the sewerage fund, were the funds of the city, to whom the bank was indebted for them; and that no officer had *authority to draw those funds with- [492*] out complying with the law which authorized it to be done. The officers of the bank knew that Lind had no right to draw checks against the fund, payable to himself or bearer, or to withdraw any of the fund from its place of deposit by checks not regularly numbered, or which did not specify the purposes for which they were drawn, or for whose benefit they were intended. The provisions of the act were intended for the protection of the city, as well as to direct the mode in which the business of the board of sewerage commissioners

should be transacted. This is evident from the nature of the provisions. Funds to a large amount were to be received by the board, and the legislature deemed it unwise to allow them to remain in the hands of the commissioners; and therefore provided that the funds should be deposited in some safe place of deposit, to be selected by the board, with the approval of the common council, with the intention that the city should have the benefit of the responsibility of the bailee with whom its funds were deposited, as security for their safe keeping.

Any other construction of the law would render it optional with the board to keep the funds in their own possession, or to deposit them as required by its provisions. The commissioners were liable to be removed from office for failure to perform their duties in this respect. The law further designated that every person receiving moneys from the depositary should execute a receipt for the same, specifying the purpose for which they were received. Hence, checks were required to be drawn to the *order of* the person for whose benefit they were intended, and to specify the purposes for which they were drawn, so that, in order to obtain the money upon the checks, the drawee would be obliged to indorse them, and thus, in effect, execute the receipt required.

The law required an examination of the checks drawn at least once in three months, and oftener, if the common council deemed it expedient, as a protection against frauds that might be committed by the treasurer of the board; and the manner in which checks were required to be drawn, was intend-
[493*] ed as a *safeguard for the protection of the city. The law substantially declares, that no moneys belonging to the sewerage fund shall be drawn from their place of deposit, except by check, upon which shall be indorsed the receipt of the drawee, and upon which shall be specified the purpose for which it was drawn.

The undertaking of Lind to obtain moneys which had been deposited in bank, on account of the sewerage fund, by checks not drawn in conformity to the law, was a fraud in itself; and when officers of the bank paid such checks, they parted with

its money without any authority in law from the city or its officers, and to one who they knew was attempting to perpetrate a fraud.

Under these circumstances, we think that checks drawn in violation of the law, and known to be so, did not authorize the bank to pay funds in its hands to the holder of such checks; and notwithstanding the payment, the bank remained liable to the city for the funds which had been deposited by it.

On the 5th of August, 1861, the city were fully advised of the manner in which checks had been drawn, and the mayor and city treasurer notified the bank that such checks would not be accepted by the city as vouchers, and that the city would hold the bank responsible for all moneys which had been paid from the city funds on such improper and illegal checks; but on the 21st of August, 1862, the city, with a full knowledge of all the facts, made a settlement with the bank, and executed to it a formal release from all liability for deposits theretofore made with it. At that time Lind was liable to the city for defalcations arising after May, 1860, in the sum of $34,732.46. The bank was liable to the city in a like sum for moneys deposited and paid upon illegal checks, for the sum of $35,105.10. The sureties of Lind had the right, upon the payment of their liability to the city, to be subrogated to *its* rights against the bank; and when the city discharged the bank from all claims for money deposited, but paid out upon these illegal and improper checks, they deprived the sureties of their rights of subrogation to that extent, and thereby discharged them, so far as their right of subrogation was destroyed.

The sureties of Lind were aware of the law which [494] required the funds of the board to be kept in some place of deposit, and it will be presumed that they entered into their obligation with reference to it, and the liability of the depositary to the city for deposits made by the board.

The discharge of the depositary deprives the sureties of one of the securities existing for their benefit at the time the bond was executed.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

Wells Willets vs. Henry Bu[illegible]s.

Contracts: *Consideration and failure thereof.*

Where, upon the purchase of land, promissory notes are given by the purchaser, in consideration of the deed of conveyance and the covenants of seizin, and against incumbrances which it contains, the deed and covenants are a sufficient consideration to support the notes; and a breach of said covenants will not constit[illegible] for [illegible] the consideration of the notes. The remedy of the [illegible]y further designupon the covenants in his deed.

Vendor and Purchaser: *Rescission of contract*

Where the deed contains a covenant for the co[illegible] at the maturity of the notes given upon the [illegible] maker offers to perform his part of the cont[illegible] able to convey title, the maker may rescin[illegible] payment of the notes and recover any porti[illegible] already paid.

Setoff: *Of damages for breach of covenant [illegible] action upon the note for purchase money.*

Where, upon the purchase of land, notes ar[illegible] consideration of the deed of conveyance and [illegible] cumbrances therein contained, and there i[illegible] it seems that if the grantee pays the incu[illegible] it, he may have the damages thus sustain[illegible] in an action against him thereon. The [illegible] the notes form but one transaction, and da[illegible] of the covenant grow out of the contract and may be set off against the notes.

Mortgages: *Redemption barred only by foreclosure.*

The mere fact that a mortgage declares that the title shall vest in the mortgagee, if prompt payment is not made, cannot bar a redemption, That can only be done by a foreclosure.

Same: *Eviction under a mortgage, when divests title.*

An eviction of a subsequent purchaser of land, under a prior mortgage without a foreclosure, does not change the title to the property. It would still remain subject to redemption, and the title in such purchaser subject to the mortgage.

But it would be otherwise, where there is an eviction under a foreclosure, as then the title would be divested out of such purchaser.

MEASURE OF DAMAGES: *On a breach of a covenant against incumbrances.* On a breach of covenant against incumbrances, the grantee can only recover such damages as he has actually sustained. If by it the title has failed, and the premises have been lost, he may recover to the full extent of the covenant; or, if he has removed the incumbrance, he may recover the sum paid for the purpose, unless it exceeds the limits of the covenant.

But if he has not been disturbed in the title, or has paid nothing to remove the incumbrance, he can only recover nominal damages for the breach. If, however, eviction has taken place, he may recover substantial damages.

APPEAL from the Circuit Court of *Mercer* County.

...d hold the ...pellee against appellant upon two promis... been paid from ...g in a judgment in the court below for the checks; but on t... knowledge of all ...ently stated in the opinion. and executed to ... *Campbell*, for appellants. *J. R.* and *I. N.* posits theretofore ... to the city for d... sum of $34,732.4... Did the court below err in sustain- [498*] sum for moneys c... appellant's fourth plea? To that the sum of $35,10... several replications, to which a demurrer upon the paymen... plea avers, that the notes sued upon were rogated to *its* rig... charge of lands described in the plea, and that charged the b... for their execution was a deed of con- paid out upon ... nd the covenants it contained. That the land was conv... the sum of $4,000, for a part of which these notes were g... That the deed contained a covenant, that the grantor was lawfully seized in fee simple, and that the premises were free from incumbrance. That when the deed was made, appellee was not well seized, and the lands were not free from incumbrance, but were and still remain incumbered by a certain mortgage made by Mathews, appellee's grantor, to Clarinda Willets, to secure the payment of $1,-123.98, one-half due in two years from the fourth of August, 1858, and the remainder in three *years from [499*] that date, the entire sum drawing ten per cent. inter-

est. That the mortgage contained a provision, that if Mathews should fail to pay the notes, according to their tenor and effect, the title to the premises should be vested and become absolute in and belong to the mortgagee.

That appellee derived all of his right and title to the property from Mathews, by deed made subsequent to the mortgage. That the deed to Clarinda Willets was recorded before the deed of Mathews to appellee. That the notes secured by the mortgage, or either of them, have not been paid, and the title to the premises has become absolute in Clarinda Willets, whereby the consideration of the notes has failed.

The averment in the plea is, that the covenants in the deed formed the consideration of the notes sued upon in this action. It is specifically averred that the consideration was the deed and covenants it contained. It is obvious that covenants for title are a consideration to support a promissory note. The deed and covenants were received and relied upon by appellant when he executed the notes. The contract was fully executed by appellee when he made the conveyance. The plea does not aver that the purchase of title to the land was the consideration of the notes, but it was the deed and covenants. If the covenants had been for the conveyance of the title, and at the maturity of the notes appellant had offered to perform his part of the contract, and appellee had been unable to convey title, then appellant might have rescinded the contract, avoided the payment of the notes and recovered any portion of the purchase money already paid. The case of *Foster v. Jared*, 12 Ill., 451, sustains this doctrine.

In the case at bar there is no pretense that there has been a rescission of the contract; no conveyance of the land has been made or even offered by appellant. He has ample remedy on the covenants, if there has been a breach, for the recovery of all damages he may have sustained. Or if he had paid the mortgage, or any portion of it, he might have set off the damages thus sustained against the notes in this action. The giving of the covenant and the notes form but one
[500*] transaction, *and damages arising from a breach of the

covenant, grow out of the contract and may be set off against the notes. *Sargent v. Kellogg*, 5 Gilm., 273; *Edwards v. Todd*, 1 Scam., 462; *Nichols v. Ruckells*, 3 id., 298; *Kaskaskia Bridge Co. v. Sherman*, 1 Gilm., 15. These cases in principle sustain such a defense.

The averments of the plea do not show a failure of consideration, but they do show a breach of the covenants, which were the consideration for the notes. But it does not even show that the title had failed. It appears that the title to the land rested in appellant, and there is nothing appearing that it has failed. It was incumbered, it is true; still the title passed, and has not been divested. From anything that is shown, we do not perceive that anything prevents a redemption so as to free the title from incumbrance. The mere fact that the mortgage declared that the title should vest in the mortgagee, if prompt payment should not be made, could not bar a redemption. That could only be done by a foreclosure. For aught that appears, appellant may be in the peaceable possession of the premises, and may not ever sustain damages by reason of the incumbrance. On a breach of a covenant against incumbrances, the grantee can only recover such damages as he has actually sustained. If by it the title has failed, and the premises have been lost, he may recover to the full extent of the covenant; or, if he has removed the incumbrance, he may recover the sum paid for the purpose, unless it exceeds the limits of the covenant. But if he has not been disturbed in the title, or has paid nothing to remove the incumbrance, he can only recover nominal damages for the breach. If, however, eviction has taken place, he may recover substantial damages. The plea fails to aver that appellant has been evicted, or that he has paid anything on the incumbrance; and it follows that the breach is only technical, and if it was a plea of setoff, it would only be of nominal damages. For these reasons we must hold the plea bad, and that the demurrer was properly sustained.

The other pleas in the case are in substance the same, except that they aver an eviction. But we have seen that the

[501*] deed *and the covenants were the consideration, and it is not averred that the title has failed. The covenant has been broken, but appellant still holds the deed and the covenants, with the right to sue for their breach, or if he choose, to set off the damages by a proper plea. But an eviction under the mortgage without a foreclosure does not change the title to the property. It would still remain subject to redemption, and the title still in appellant, subject to the mortgage. But it would be otherwise if there had been an eviction under a foreclosure, as then the title would have been divested out of appellant, but still it would not have constituted a failure of consideration of the notes.

The replications to the several pleas, the demurrer to which was overruled, denied that appellee covenanted in manner and form as alleged in the pleas. That averment, had the pleas been otherwise sufficient, would have been material, and must have been proved when traversed, before appellant could have succeeded in his defense. If there was no such covenant, there could have been no breach. But even if the replications were not sufficient, they were good enough for the bad pleas to which they were filed. The other assignments of errors are not insisted upon, and we will not consider them. The judgment of the court below is affirmed.

Judgment affirmed.

NICHOLAS P. IGLEHART and CHARLES W. CLAYTON vs. BUCKNER S. MORRIS.

JUDGMENT BY CONFESSION: *Not erroneous, if within the amount laid in the ad damnum.*[1]

Where the amount of a judgment by confession upon a promissory note is within the amount laid in the *ad damnum* in the declaration, the judgment will not be reversed in error, although it exceeds the

[1] See Linder *v.* Monroe, 33 Ill., 388; Oakes *v.* Ward, 19 id., 46; Brown *v.* Smith, 24 id., 196; Rives *v.* Kumler, 27 id., 291; Kelly *v.* National Bank, 64 id., 541.

amount of the note, interest and attorney's fee, for which the warrant of attorney authorized confession of judgment. Application in such cases should be made in the circuit court, where the judgment was rendered, to correct it.

SAME: *Sufficient if record recites proof of warrant of attorney.*

Where the record of a judgment by confession recites that the execution of the power of attorney to confess the judgment was duly proved; upon error brought, this will be sufficient, although no affidavit was filed of the execution of the warrant of attorney.[1]

ERROR to Circuit Court of *Cook* County.

The case is sufficiently stated in the opinion.

Arrington & Dent, for plaintiffs in error. *Scammon, McCagg & Fuller*, for defendant in error.

BREESE, J. The judgment in this case was entered [503] on a cognovit, in the Cook circuit court. The record was brought here by writ of error, and a reversal sought on the ground that no affidavit was filed of the execution of the note or warrant of attorney, and that the judgment exceeds the amount of the note and interest and attorney's fee.

On the last point, it will be observed the amount of the judgment is within the *ad damnum* in the declaration. In such case we held in the case of *Plats v. Turrill et al.*, 18 Ill., 273, that on a writ of error the judgment will not be reversed. So it was held in *Thompson v. Turner*, 22 id., 389, that a judgment by default might be rendered against a defendant regularly served with process, for an amount greater than *is stated in the summons, if within the [504*] damages claimed in the declaration. But if it was irregular, application should have been made in the circuit court, where the judgment was rendered to correct it.

As to the other point, the amended record shows that the execution of the power of attorney to confess the judgment was duly proved. It is, therefore, not like the case of *Durham v. Brown* 24 Ill. 93, cited by plaintiff in error. The

[1] See Hall *v.* Jones, 32 Ill., 38; Iglehart *v.* Church, 35 id., 255; Iglehart *v.* Chicago M. & F. Ins. Co., id., 514; Osgood *v.* Blackmore, 59 id., 261.

judgment in that case was confessed in vacation before the clerk, and the proper papers were not filed before him.

We do not perceive any error in the record, and accordingly affirm the judgment.

Judgment affirmed.

SILAS RAMSEY vs. JOHN A. PERLEY and SAMUEL L. FLEMING.

EQUITY JURISDICTION: *Defense at law.*

The rule is well settled that where, by the use of ordinary diligence and precaution, a defense could have been made available upon the trial of a suit at law, no relief will be granted in equity.

SAME: *Same.*

Where, therefore, a bill filed by a surety to recover back moneys paid by him, alleged that with and as surety for F., he executed a promissory note to P., which not being paid at maturity, a suit was brought and judgment recovered thereon, which was paid by complainant; that the note contained usury, and that by subsequent agreements for usury between F. and P., the latter extended the time of payment, whereby complainant was discharged; that complainant had no knowledge of the usury or subsequent agreements until after recovery of the judgment against him and its payment, and that F. was insolvent; but the bill contained no allegation that these defenses could not have been successfully made in the suit at law, if they had been known, nor that complainant used any diligence whatever to ascertain whether he had a defense or not: *Held*, that until the contrary was shown, it would be presumed that by the exercise of due diligence complainant would have been informed of the facts alleged by him; that reasonable diligence required him to inquire of F., if there was any defense which could be made to the action, and that the bill was bad on demurrer.

USURY: *Not recoverable back.*[1]

It is the settled law of this state that usury voluntarily paid, under the law of 1857, cannot be recovered back.

ERROR to Circuit Court of *Marshall* County.

The case is sufficiently stated in the opinion.

Bangs & Shaw and *Barnes & Winston*, for plaintiff in error. *James St. Clair Boal*, for defendants in error.

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[1] See Manny *v.* Stockton, *ante*, 306.

Beckwith, J. This is a suit in equity, to recover [507] moneys paid by the complainant, as surety of the defendant Fleming, to the defendant Perley. The bill alleges that the complainant, with, and as surety for Fleming, on the 18th of November, 1857, executed a promissory note to Perley for $562, payable four months after date; that the note was not paid at maturity, and that a suit was brought and judgment recovered thereon in 1860, which was afterwards paid by complainant. The bill further alleges that the note contained usury, and that, by subsequent agreements for usury between Fleming and Perley, the latter extended the time of payment, whereby the complainant was discharged; that the complainant had no knowledge of the usury or subsequent agreements until after the recovery of the judgment against him and its payment, and that Fleming is insolvent. There is no allegation that these defenses could not have been *successfully made in the suit at law, if they had been [508*] known; and it is not alleged that the complainant used any diligence whatever to ascertain whether he had a defense or not.

Until the contrary is shown, it will be presumed that, if the complainant had used due diligence to ascertain whether he had any defense, he would have been informed of the facts now alleged by him. The facts were all known to Fleming, and upon the commencement of a suit against the complainant, reasonable diligence required him to inquire of Fleming if there was any defense which could be made to it. The rule is well settled, that where, by the use of ordinary diligence and precaution, a defense could have been made available upon the trial of a suit at law, no relief will be granted in equity. 3 Gra. & Wat. on New Trials, 1490.

In regard to the allegations of usury, it may be added, that it is the settled law of this state that usury voluntarily paid under the law of 1857 cannot be recovered back. *Hadden v. Innis*, 24 Ill., 381; *Dooley v. Stipp*, 26 id., 86; *Lucas v. Spencer*, 27 id., 15; *Johnson v. Thompson*, 28 id., 352; *Tompkins v. Hill*, id., 519; *Perkins v. Conant*, 29 id., 184.

The decree of the court below, sustaining a demurrer to and dismissing the bill, is affirmed.

Decree affirmed.

David Henry vs. Philander Eddy.

Pledges: *As security for a debt; when owner may resume possession.*

When the owner pledges property or choses in action as a security for the payment of a debt, the owner, to reinvest himself with the right to resume possession of the property, must pay the claim, or at the very least, make a sufficient tender.

Same: *Right to hold the pledge passes to creditor's representatives.*

On the death of the creditor, the right to hold the pledge passes to his representatives, and may be exercised by them in the same manner and to the same extent as by the creditor when living.[1]

Same: *Same.*

Where it was doubtful upon the evidence whether a party holding a promissory note as security for a claim against its owner came into possession of it as agent of the administratrix of the deceased creditor, or as his clerk, it was *held*, in an action of trover against him by the debtor, that an instruction making the defendant's right to hold the note conditional upon the consent and agreement of the debtor, was erroneous. If it came to defendant's possession from the creditor or his administratrix and was held as a pledge, the consent of the the debtor was immaterial.

Promissory Notes: *Possession of, evidence of ownership.*[2]

The possession of a promissory note is presumptive evidence of ownership; but that ownership is limited by the statements of the possessor as to the character of his possession.

New Trial: *Verdict against the evidence.*

It is error to refuse a new trial where the verdict is manifestly against the evidence.[3]

Appeal from Circuit Court of *Cook* County.

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[1] See Belden *v.* Perkins, 78 Ill., 449, as to the effect of a transfer of the property by the pledgee.

[2] See McConnell *v.* Hodson, 2 Gilm., 640; Curtis *v.* Martin, 20 Ill., 558; Best *v.* Nokomis National Bank, 76 id., 608; Palmer *v.* Gardiner, 77 id. 143; Farwell *v.* Meyer, 35 id., 40; Burnap *v.* Cook, 32 id., 168.

[3] See Chicago & R. I. R. R. Co. *v.* Hutchins, *ante*, 108.

Replevin by appellee against appellant, to the declaration in which a count in trover was added, for a certain promissory note, executed by Redmond Prindiville to appellee, and which being in the appellant's possession, he refused, upon demand therefor, to surrender to the appellee, claiming the right to hold it as security for a debt owed by appellee to the estate of Andrew Combs.

Upon the trial the defendant requested the following instruction, which was refused as requested, but given with the qualification included in brackets and printed in italics:

(2) "If the jury believe from, etc., that the plaintiff was indebted to the estate of Andrew Combs at the time this suit was brought, and that the note in suit was held by defendant as collateral security for plaintiff's indebtedness aforesaid, to the estate of said Combs, and that the said note was so held by defendant with plaintiff's knowledge and consent; in that case the plaintiff cannot recover in this action.

"And it makes no difference as to the rights of the parties in this case, whether the note in suit had been originally pledged by the plaintiff to Combs himself for the purpose above mentioned, and that it passed from Combs' possession to that of defendant upon the same trust, or whether it was originally left with defendant by the plaintiff himself as a security for Combs' benefit, provided the jury are satisfied from the evidence that the plaintiff [*agreed and consented to defendant's retaining the said note as collateral security for an indebtedness of plaintiff to Combs, and*] has expressly recognized the right of defendant to hold the note for the purpose aforesaid."

The jury found for the plaintiff, with $257.50 damages, for which judgment was rendered upon the count in trover.

The errors assigned are:

(1) In refusing defendant's second instruction, as requested, and in giving it with the aforesaid qualification.

(2) That the verdict was clearly against the evidence.

(3) In overruling defendant's motion for a new trial, which was moved for on account of the modification of said instruc-

tion, and on the ground that the verdict was against the law and the evidence.

Hoyne & Ayer, for appellant. *S. Ashton*, for appellee.

[514*] *WALKER, C. J. When the owner pledges property or choses in action as a security for the payment of a debt, the creditor, without doubt, has the legal right to hold the pledge until the debt is discharged. The owner, to reinvest himself with the right to resume possession of the property, must pay the claim, or at the very least make a sufficient tender. On the death of the creditor the right to hold the pledge passes to his representatives, and may be exercised by them in the same manner and to the same extent as by the creditor when living. Any other rule would defeat the agreement of the parties, and would work injustice and wrong.

It appears from the evidence in this case that at the time when the note was called for by the agent of the appellee, and when the sheriff served the writ, appellant claimed to hold the note as security for claims against appellee. And Horton testified that appellee admitted to him, that appellant held the note for what he owed the estate of Andrew Combs. He was also shown the notes and accounts, and his attention was called to an order which he had given on Combs, which, however, was not presented, and he admitted that he owned [owed] a portion of the claims. There is no evidence in the record that he had ever paid or tendered the amount due upon the debt, [515*] for which the note *in controversy was held as security. He also agreed, if appellant should permit Keith to take the note and collect a specified portion of the money, that the note would be returned, which was done. There was no conflicting testimony, and uncontradicted, the evidence establishes appellant's right to hold the note until the debt should be paid. Appellant's possession of the note was presumptive evidence that he was the owner, but that ownership was limited by his statements, and it devolved upon appellee to overcome the presumption. The finding of the jury was there-

fore manifestly against the evidence, and a new trial should have been granted.

If appellant was clerk of Combs, or was the agent of Mrs Combs, the administratrix of her husband's estate, it could make no difference whether appellant had the note with appellee's consent, if it had been pledged in the lifetime of Combs Whether he held it as agent of the administratrix, or it came to his hands as the clerk of Combs, and had not been delivered to her, could make no difference. It appears that he had been the clerk of Combs, and he claimed to the sheriff that the note had been placed in his hands by certain parties, and he would render himself liable by giving it up before the debt should be paid, and, for that reason, declined.

The court modified defendant's second instruction, by limiting his right to hold the note only by the consent and agreement of appellee. We have seen that if it came to his possession from Combs or Mrs. Combs, as administratrix, and was held as a pledge, it was not material whether it was with the consent of appellee. And appellee showed as a part of his evidence, that appellant claimed to have received it of Combs, and that he held it as a pledge, and this must be regarded as true. This modification was calculated to, and no doubt did, mislead the jury in finding their verdict. The instruction as given was erroneous. The judgment is reversed.

Judgment reversed.

Charles Jupitz vs. The People of the State of [516] Illinois.

Evidence: *Identity of property stolen, how proved on trial of indictment for receiving stolen goods knowing them to have been stolen.*

Upon the trial of an indictment for receiving brass couplings, knowing them to have been stolen, it is proper for the purpose of identifying and proving the kind of property stolen, for the people to bring a brass coupling into court and show by the testimony of witnesses that the

couplings stolen were similar to the one brought into court and shown to the witnesses. But this kind of evidence was unnecessary. Proof that the articles were brass couplings that had been stolen, and that the prisoner knew it, would have made out the case.

SAME: *Expert testimony.*

Where, upon the trial of an indictment for receiving twelve brass couplings, knowing them to have been stolen, it was in proof that the prisoner kept a junk shop on one of the principal streets of Chicago, and bought the couplings for what, if they were adapted to present use, was far below their real value; but it appeared that they were bought openly, publicly, in daylight and in the usual course of business, and that the purchaser paid no attention to the articles, and had purchased articles of the same individual previously; that the couplings were brought in a bag, emptied out on the scales, weighed as old brass, paid for as such, and thrown into a barrel standing in the room: *Held*, that testimony of witnesses called on behalf of defendant to prove that they were machinists and brass finishers of large experience, and that from common observation and without close inspection it could not be told whether couplings, such as the one shown the witnesses in the case for the purpose of identification and which was shown to be similar to the ones stolen which were not produced, were perfect or imperfect, whether they were of any use for the purpose for which intended, or merely valuable as old brass to remold, was admissible, as it would have a tendency to rebut the presumption of guilty knowledge arising from inadequacy of price paid;[1] and that the rejection of such evidence was error.

SAME: *Of good character of accused in criminal cases.*[2]

In all criminal cases, whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner.

SAME: *Same; on trial of indictment for receiving stolen goods.*

Where, upon the trial of a junk dealer for receiving stolen goods (brass couplings) knowing them to have been stolen, there was no direct proof of guilty knowledge, but only the presumption of guilt arising from the fact that the price he paid was far below their real value if the articles were adapted to present use, which was not clearly established; and the defendant requested an instruction, that the evidence of good character for honesty introduced by defendant should have great weight in determining as to his guilt or innocence, and that if they found that the defendant had theretofore borne and then bore a good character for honesty, it should have great weight in his favor, which the court qualified by adding the words, "if the jury

[1] See Andrews *v.* The People, 60 Ill., 354.

[2] See Conkwright *v.* The People, 35 Ill., 204; Walsh *v.* The People, 65 id., 58.

believe there is any doubt of his guilt:" *Held*, that the instruction as qualified was objectionable on the ground, inferable from the qualification, that the court did not consider evidence of good character of any weight except in a doubtful case. Proof of uniform good character in such a case is entitled to great weight, and should raise a doubt of guilty knowledge.

INSTRUCTIONS: *Error to assume the guilt of accused.*

Where, upon the trial of an indictment, the defendant requested an instruction that if the jury found from the evidence that the defendant had theretofore borne and still bore a good character for honesty, it should have great weight in his favor, which the court qualified by adding the words, "if the jury believe there is any doubt of his guilt:" *Held*, that the qualification was objectionable as amounting to a declaration by the court that there was no doubt of the prisoner's guilt.

ERROR to Recorder's Court of Chicago.

Indictment for having and receiving stolen goods, knowing them to have been stolen.

The guilty knowledge of the plaintiff in error, when he purchased the goods in question, was the principal point in issue, and of this there was no direct evidence. The testimony of the person who stole the goods was that, although they were stolen by him, that fact was not communicated by him to the defendant when he purchased the goods. The people introduced testimony as to the taking away of certain brass couplings belonging to the Michigan Central R. R. Co., and were permitted, against the objection of the defendant, to bring a brass coupling into court, and to show by the testimony of witnesses that the couplings stolen and those sold to defendant were like the one in court and shown to the witnesses.

The rest of the case and the assignments of error are sufficiently stated in the opinion.

Fuller & Ham and *Runyan*, for plaintiff in error. *D. P. Jones*, State's Attorney, for the people.

BREESE, J. Upon the first point made by the [520] plaintiff in error, that of the mode adopted by the court to identify the property stolen, we can perceive nothing objectionable. The indictment was for having and receiving

twelve brass couplings, knowing them to have been stolen. Proof, coming up to the allegation, is all that is necessary in any case. The witnesses all concur that the couplings stolen were more or less like the one produced in court. This was sufficient to prove the kind of article. Suppose the charge had been for having and receiving twelve iron wagon boxes, knowing them to be stolen, and which may have been sunk in the lake, so that no one of them could be produced for identification, would it not be competent for the prosecution to bring into court a common iron wagon box and ask the witness if they were like that, or wherein they differed from it? Had the charge been twelve pistols, or any similar articles, why, on what principle is it a pistol could not be introduced and the inquiry made as to similarity? But why introduce this kind of evidence at all? Proof that the articles were brass couplings that had been stolen, and the prisoner knew it, would have made out the case.

The next point made by the plaintiff in error is, the rejection of the testimony of Daily and Finnegan.

When we regard the position the prisoner occupied, we can not but consider the testimony offered by these witnesses of great importance.

It is in proof that the prisoner kept a junk shop on one of the principal streets in Chicago, and dealt in old brass and junk generally. It is in proof, if the articles he bought were couplings adapted to present use, a strong presumption of guilt arises from the fact that the price he paid[1] was far below their real value as coupling. These witnesses were called to prove that they were machinists and brass finishers of large experience, and that from common observation, and without close inspection, it could not be told whether boxes (couplings), such as was shown in the case, were perfect or imper-
[521*] fect; *whether they were of any use for the purpose for which they were intended, or were merely valuable as old brass, to remold or melt over.

[1] Three dollars. There was testimony that they were worth from $2.25 to $3.00 each.

It is in proof, that the prisoner paid no attention to the articles, and that he had purchased articles of the same individual previously. They were brought in a bag, emptied out on the scales, weighed as old brass, paid for as such, and thrown into a barrel standing in the room. All this was done openly, publicly, in daylight, in the usual course of business. Such testimony as that offered would at least have had a tendency to destroy the presumption arising from the inadequacy of price, and should have been admitted.

The next point made by the plaintiff in error is the qualification of the third instruction asked for by him. As originally asked, this instruction was as follows: The jury are further instructed that the evidence of the good character for honesty of the defendant should have great weight in determining as to his guilt or innocence; and if they find from the evidence that the defendant has heretofore, and now bears a good character for honesty, it should have great weight in his favor.

This was qualified by the court by the addition of these words: "If the jury believe there is any doubt of his guilt."

The instructions as asked may be objectionable on account of the epithet great, but as that was not the ground of the qualification, but on the ground, as is inferable, that the court did not consider evidence of good character of any weight except in a doubtful case. The more modern decisions in criminal cases go to the extent, that in all criminal cases whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner. The latest case now recollected is the case of *Hopps v. The People*, 31 Ill., 385. The qualification is objectionable further, on the ground that it amounts to a declaration by the court, that there was no doubt of the prisoner's guilt, which the court certainly did not intend, but the language might be liable to that construction with the jury.

We can hardly imagine a case where evidence of good character was a more important element of defense than this, and, *in the language of the instructions, was entitled to greater weight. Proof of uniform good charac- [522*]

ter should raise a doubt of guilty knowledge, and the prisoner would be entitled to the benefit of that doubt. Proof of this kind may sometimes be the only mode by which an innocent man can repel the presumption of guilt arising from the possession of stolen goods. It is not proof of innocence, although it may be sufficient to raise a doubt of guilt. The court seemed to think it was entitled to no weight, unless taking the language used in the most favorable aspect, there was doubt of his guilt.

A strong *prima facie* case was made out by the prosecution, but it was not conclusive. If the court had told the jury, that his good character should be taken into consideration by them, and was entitled to much weight, a reasonable doubt of the prisoner's guilt might have been raised which would have resulted in his acquittal.

We deem it unnecessary to discuss the evidence. The case will go to another jury, and we would not prejudice it one way or the other. For the reasons given the judgment must be reversed and a *venire de novo* awarded.

Judgment reversed.

William B. Ogden vs. Gustave Stock.

Replevin: *For fixtures tortiously served.*[1]

Where a fixture constituting a part of the realty is tortiously served and removed without the consent of the owner of the fee, it becomes personalty, and may as such be recovered by him in an action of replevin.

Fixtures: *Right of removal as between vendor and purchaser of land under an executory contract;*[2] *replevin therefor.*

Where the purchaser of a city lot under a contract of purchase — providing that, upon default of payment, the vendor might terminate the agreement and treat the vendee, his representatives or assigns, as tenants at will at a specified rent — while owing the greater portion of the purchase money, in default for payments matured, and paying no

[1] See Anderson *v.* Hapler, *ante*, 436; Ewell on Fixtures, 414, *et seq*. and the cases there cited.

[2] See Ewell on Fixtures, 272.

rent for his occupation of the premises, conjointly with defendant under an agreement that each should own half thereof, erected on the premises a dwelling house placed upon blocks resting on boards lying on the ground, and afterwards sold his share to defendant who removed it from the lot: *Held*, that while in the enjoyment of the property under such circumstances, the purchaser could not honestly assert that he did not intend to perform his contract, and that he intended the erection on the lot as property separate from the freehold, and therefore, neither he nor his vendee, the defendant, could rightfully remove it from the premises; and that, so long as the house could be identified and was not permanently annexed to other realty, replevin was sustainable therefor.

Appeal from Superior Court of *Chicago*.

The case is sufficiently stated in the opinion.

Scammon, McCagg & Fuller, for appellant. *Wm. Hopkins*, for appellee.

Beckwith, J. This is an action of replevin, brought [526] by the appellant for a dwelling house, alleged to have been wrongfully removed from a lot belonging to him, by the appellee. The pleas are *non detinet*, and property in the appellee. On the trial, it was admitted that the appellant, in 1856, and from that time to the commencement of the suit, had been the owner in fee of the lot from which the building was removed; and it appeared in evidence that while he was the owner of the lot, in 1856, he made a contract with one Schuster, to sell him the same for $525, of which $25 was paid in cash, and the residue was to be paid in five annual installments, the last of which fell due September 1, 1861. Four of the installments had become due, but only one of them had been paid. The contract provided that if the vendee should make default in any of the payments, *the ven- [527*] dor should have the right to consider the agreement terminated, and to treat Schuster, his representatives or assigns, as tenants at will, at a specified rent.

In 1858, while Schuster was in possession of the lot under the contract, he and the appellee erected thereon a dwelling house, under an agreement that each was to own one-half of the same. The house was placed upon blocks, resting on

boards, lying on the ground. For about two years after the house was finished, Schuster occupied it with his family, and in January, 1861, sold his share to the appellee, to whom he gave permission to occupy the lot until September, 1861. The house remained on the lot until June, 1861, when it was removed by the appellee. The appellant demanded possession of the house, and upon the refusal of the appellee to surrender the same, commenced this suit for its recovery. Upon the trial in the court below, the jury were instructed that the appellant was not entitled to recover. The general rule of the common law is, that things affixed to the realty become part of it, and belong to the owner thereof; but erections, which, from their general nature and character, are ordinarily deemed a part of the freehold, may be made in such manner, or under such circumstances, as render them distinct and separate property. In order to do this, the person making the improvement, must have the right to determine whether or not the erection shall become a part of the realty; and it must appear that it was not intended to form a part thereof.

The intention may be inferred, in some cases, from the manner in which the improvement is attached to the realty; and in others from the nature of the title of the party making it, or from the purpose with which it was made; but if the party making the improvement, as between himself and the owner of the soil, has no right to erect the same, as property separate and distinct from the freehold, an intention so to do, no matter how clearly manifested, is of no avail. Schuster, at the time the dwelling house was erected, was the vendee of the appellant, in possession of the premises under an unexecuted contract requiring him to pay for the land and [528*] make it his own. He *was in default for a part of the payments already matured, owing a greater portion of the purchase money, and paying no rent for his occupation of the premises. His enjoyment of the property was solely by reason of his agreement to pay for the same; and the law will presume that he intended to perform his agreement in good faith. It may well be presumed that the vendor, relying upon

the agreement, and the additional security of the improvements for its performance, allowed Schuster to remain in possession after default in making his payments; and while in the enjoyment of the property under such circumstances, he could not, honestly, assert that he did not intend to perform his contract, and that he intended the erections on the lot as property separate from the freehold.

The law will not infer a dishonest intention, nor give effect to one when proven. The mode adopted in the construction of the foundation of the house would not, under the circumstances, show an intention on the part of the vendee to erect and maintain the same as property separate and apart from the realty. Having no right to claim that the improvements bore that relation to the freehold, he cannot be presumed to have made them with that intention. His position in regard to improvements was analagous to that of a mortgagor, who has no right to remove improvements he has put upon the land, permanent in their nature, for the reason that the law presumes that they were annexed with the design of being permanent. *Dooley v. Crist*, 25 Ill., 551. No intention at variance with this presumption is allowed to affect the rights of a mortgagee, or of a vendor, where the vendee is in possession under an obligation to make the land his own. *Smith v. Moore*, 26 Ill., 292. The appellee, at the time the house was built, was bound to take notice of the relation subsisting between the appellant and Schuster; and the evidence tends to show that he had actual knowledge thereof; what Schuster could not do, he could not authorize or permit another, either along with himself or separately, to do; and, therefore, it is not perceived how the appellee, by joining with Schuster in erecting the building, under an agreement to become part *owner of it, and afterwards obtaining a convey- [529*] ance of Schuster's interest therein, acquired any right to remove it from the premises.

The dwelling house, prior to its removal, was a part of the realty, and the legal title to the same was in the appellant. So long as the contract for the purchase of the land remained

unexecuted, Schuster had only an equitable right to the house as a part of the realty, and the appellee acquired no greater right to it. They had no right of possession, dependent of their right to occupy the land, and when himself removed from the realty, their right of possession, hardship of such severance and removal of the house was to offer an improvement which it was separated from the property under regard for a right to occupy, but did not change the obligations of his the appellant as the owner of the freehold occupy a position in legal title drew to it the right of possession the one, in order Schuster's right of possession ceased. privilege, thus allowed, have maintained trespass or trover for the actions; and the privilege therefore the action of replevin was sustained other personal privilege house could be identified, and was not personal entitled to it. It was other realty. *Davis v. Easley*, 13 Ill., 192; and *Worrall v. Jones*, 8 Ill., 369, and in which the testimony was remanded. upon the objection, in

Judgment reversed. suit, and we know of testimony of parties to are willing to testify, otherwise, disqualified. Gilm., 347, was decided *Browning*, 4 Eng. Com. Law, and never sustained could not

JAMES C. BELL and CHARLES H. BELL, vs. JAMES S. THOMPSON.

WITNESSES: *When parties to the record are competent.*

A party to a suit may be examined as a witness in favor of the opposite party and against himself, or those with whom he is associated of record, if he does not personally object to giving evidence, or is not disqualified on the ground of interest.[1]

SAME: *When a partner is competent for plaintiff in an action against his firm.*

Where one member of a firm has taken the notes and accounts of the firm, and is to pay the liabilities, he is a competent witness for a creditor of the firm in an action against himself and the other members of the firm (Crook *v.* Taylor, 12 Ill., 353, approved, and the rule in Brown *v.* Hurd, 25 Ill., 616, qualified so as not to exclude the testi-

[1] By statute, interest no longer disqualifies a witness, but only goes to his credibility. Rev. Stat. 1874, 488.

mony of parties who are not disqualified on the ground of interest and who do not object to testifying).

SAME: *Preliminary affidavit under act of* 1861.

The affidavit required by the act of February 20, 1861, to be made previous to calling an opposite party as a witness, is not required to, ... such excluded ... with to be true to the knowledge of the party making it, but may be made upon information and belief.

... interest, only ap... *of* 1861, *all of defendants need not be called.*

their side of the ... the party making the affidavit to testify, until he ... and in many ... er parties; but he is not required to call all of ... suit may be ex... esire to testify himself; in such case he may ex... party, and against ... the opposite parties as he thinks proper.

...ated of record, if ... RT: *Objections to preliminary affidavit under* ... dence, or is not dis... *in court below.*

Worrall v. Jones, ... of an affidavit required to be made under the ... B., 733; *Haddock* ... v to calling an opposite party as a witness, can... *Thomas*, 6 M. & W... st time upon error.[1]

Bowen v. Burk, ... 554; *Miner v. Dou*... ssory note, the plaintiff is entitled to a recov... 371; *Purcell v. K*... counts upon the original indebtedness consti... *Norris*, 2 id., 285; *Woodruff v. Westcot*...

In the case under ... rt of *Mercer* County. had an interest to def... missory note by James S. Thompson prevent a judgment ag... rles H. Bell and Benjamin F. Thompbeen had against him... iers, the note in question being exe... defendants. ... Thompson." Benjamin F. Thompson was dismissed from ... rles H. Bell filed a plea of *non assumpsit*, and Ja... l a plea in abatement, putting the existence of the partn... ip in issue. Benjamin F. Thompson was, upon the trial of t... cause, examined as a witness by the plaintiff (who had filed the preliminary affidavit required by the act of February 20, 1861), for the purpose of establishing the partnership, to which his co-defendants took an exception.

The judgment of the court below was for the plaintiff.

Leland & Blanchard and *J. R. & J. N. Bassett*, for plaintiffs in error. *Glover, Cook & Campbell*, for defendants in error.

[1] Gordon *v.* Goodell, *ante*, 429, and note.

[530*] *Beckwith, J. At common law, parties to the record were not required to testify on the ground of expediency; to avoid temptation to commit perjury. It was considered unjust to require a person to charge himself civilly, or criminally, by his own testimony; and the lardship of such a requirement was thought to be so great as to offer an improper temptation to commit crime. From a tender regard for the rights of a party to the record, and the obigations of his conscience, the law did not require him to occupy a position in which he might be called on to sacrifice the one, in order [531*] to maintain the other. The *priviege, thus allowed, proceeded from personal considerations; and the privilege itself was a personal one. Like all other personal privileges, it might be waived by the party entitled to it. It was remarked by Lord Chief Justice Tindall, in *Worrall v. Jones*, 7 Bing., 398, that "no case could be found in which the testimony of a witness had been rejected upon the objection, in the abstract, that he was a party to the suit, and we know of no rule of public policy requiring the testimony of parties to the record to be excluded, where they are willing to testify, and are not, on the ground of interest or otherwise, disqualfied. The case of *Frazier v. Laughlin*, 1 Gilm., 347, was decided on the authority of *Maul v. Mainwaring*, 4 Eng. Com. Law, 48, which has long since been overruled, and never sustained the proposition that a party to the record could not be permitted to testify from considerations of public policy. It has been supposed that there was some public policy which excluded parties from being witnesses, but no court or elementary writer has ever informed the public wherein its interests or its welfare would be promoted by such a rule. No good reason has ever been given in its favor, and its adoption would promote no beneficial result. If a party voluntarily waives a privilege which the law from personal consideration allows him, there are no rules of law or considerations of public policy which forbid it, or allow other persons to assert such privilege, where the party to whom it is allowed insists upon renouncing it.

Where a party waives the privilege which the law allows him, ordinarily, the only question is, whether he is disqualified on the ground of interest. The rule of the common law which excluded the testimony of parties on the ground of interest, only applied where they were called upon to support their side of the issue; and it has long been settled in England and in many of the states of this country, that a party to a suit may be examined as a witness in favor of the opposite party, and against himself, or those with whom he is associated of record, if he does not personally object to giving evidence, or is not disqualified on the ground of interest. *Worrall v. Jones*, 7 *Bing., 395; *Pipe v. Steel*, 2 Q. [532*] B., 733; *Haddock v. Heslop*, 12 id., 267; *Page v. Thomas*, 6 M. & W., 733; *Mervey v. Mathews*, 9 Barr., 112; *Bowen v. Burk*, 1 Harris, 146; *Paine v. Tilden*, 20 Vt., 554; *Miner v. Downer*, id., 461; *Sargent v. Sargent*, 18 id., 371; *Purcell v. Kincaid*, 1 Carter, 324; *Shallenburger v. Norris*, 2 id., 285; *Johnson v. Blackman*, 11 Conn., 342; *Woodruff v. Westcott*, 12 id., 134.

In the case under consideration the defendant Thompson had an interest to defeat the plaintiff's recovery, and thereby prevent a judgment against himself. No recovery could have been had against him, if there was no recovery against the other defendants.

It appeared from his testimony that he took the notes and accounts of the firm, and that he was to pay its liabilities. The witness, therefore, was primarily liable to pay the debt, and had no right of contribution from his codefendants. It was immaterial to him whether the burden was cast upon his codefendants and he rendered liable to them, or whether they were exonerated and he remained liable to the plaintiff. In the former event he would be liable for the costs of the present suit; and in the latter event he would escape from their payment. Under these circumstances, we are of the opinion that the witness was not disqualified on the ground of interest. In *Crook v. Taylor*, 12 Ill., 353, this court held that a partner who was not a defendant might be called as a witness

by the plaintiff to prove the cause of action against the parties sued. Such was the settled rule in the English courts. *York v. Blott*, 5 M. & S., 71; *Hudson v. Robinson*, 4 id., 475; *Hall v. Curzon*, 9 B. & C., 646.

But in *Brown v. Hurd*, 25 Ill., 616, this court held that a partner who was a defendant could not be called as a witness by the plaintiff to prove the cause of action against his codefendant. A general principle was asserted in the latter case, that a witness is incompetent to transfer to others the whole or part of a burden which, *prima facie*, rests exclusively upon himself. This rule has been adopted in courts of several of the states, and if correctly applicable to the [533*] case *of *Brown v. Hurd*, such an application of it is at variance with the well settled rule in England, and directly overrules the case of *Crook v. Taylor*. After a careful review of the authorities, we are satisfied that the rule adopted in *Brown v. Hurd* should at least be qualified so as not to exclude the testimony of parties who are not disqualified on the ground of interest, and who do not object to testifying. Had the agreement between Thompson and his codefendants appeared *aliunde*, we should have no hesitation in holding that he was a competent witness at common law.

The act of February 20, 1861, allows the party to call the other party as a witness, but requires as a condition precedent to his so doing, that an affidavit should be filed by him or his attorney, stating that he is unable to prove a fact material to sustain his action or defense, excepting by the testimony of the parties to the suit. The examination is required to be limited to the proof of the facts set forth in the affidavit. The affidavit is not required to state the facts set forth to be true to the knowledge of the party making it. It may be made by the party's attorney as well as by the party himself, and the facts would seldom be known to the attorneys excepting from information and belief. The facts are frequently not known to the party himself excepting in that manner. The legislature never intended that parties or their attorney should be required to commit perjury to avail themselves of

the provisions of the act. The issue joined in the case was, whether the defendants were partners; and the affidavit states that the plaintiff is informed and believes that they were. The objection that it does not state that they were partners at the time when they made the supposed promises and undertakings in the declaration mentioned was one of form, and might have been removed if it had been made in the court below. It comes too late here. The affidavit contained in substance all the act requires, and the plaintiff was at liberty to examine one or more of the defendants as he thought proper. The act does not allow the party making the affidavit to testify until he has called all the other parties; but he is not required to call all of them if he does not desire to *testify himself. [534*]

Under the common counts the plaintiff had a right to recover upon the original indebtedness. The issue was properly submitted to the jury, and we are satisfied with their finding.

The judgment of the court below is affirmed.

Judgment affirmed.

Charles Aulger vs. Asa S. Smith.

Evidence: *Admissions.*

Where, upon the trial of a cause, the court permits a witness to testify to a part of the testimony given by a party to the cause on the trial of a former cause, it is error to refuse to allow the witness to testify to the balance that was then said by such party. Such testimony is in the nature of an admission by the party, and when made evidence by one party, the other has a right to call for the whole statement.

Same: *Of contents of lost deposition.*

Where the deposition of a witness taken and read on the trial of a former cause is lost and the witness dead, the contents of such deposition may, when material, be proved by any person who knows and can testify as to its contents. There is no difference in this respect between lost depositions and any other written testimony, except that,

if the witness is living, proof of the contents cannot be made, as it would not be equal, as testimony, to the production of the witness himself.

Damages in Trespass: *Malice material.*

In an action of trespass for assault and battery, evidence of a conversation with defendant, in which defendant gave his version of the difficulty, and which tends to prove malice in the defendant at the time of making the assault, is material on the question of damages.

Error to Circuit Court of *Peoria* County.

The case is sufficiently stated in the opinion.

Ingersoll & Puterbaugh, for plaintiff in error. *C. A. Roberts*, for defendant in error.

[537*] *Walker, C. J. This was an action *vi et armis*, for an assault and battery. The declaration avers that defendant stabbed plaintiff with a knife. The general issue and a plea of *son assault demesne* were interposed, upon which issues were joined. A trial was had resulting in a judgment in favor of defendant, to reverse which this writ of error is prosecuted.

On the trial below, the court permitted a witness to testify to a part of the evidence of plaintiff in error, given to the jury on a criminal trial for the same offense, but prevented him from testifying to the balance that was then said by plaintiff in error. This was in the nature of an admission by the party, and when made evidence by one party, the other has a right to call for the whole statement. To permit detached portions only of an admission to be given in evidence would work great injustice and manifest wrong. It would not be giving evidence of what was said, but of something never intended. If any portion of an admission is unfavorable to the party having a right to call for it, he need not call for any portion of the statement.

It is objected that the court erred in excluding the proof of the contents of the lost deposition of C. L. Burns, taken and read in the criminal prosecution for the same assault. It was proved that his deposition was lost, and the witness had died after it was taken. The rule is well recognized, that the con-

tents of lost papers may be proved by the best attainable secondary evidence. The rule grows out of necessity, to prevent injustice and wrong. So long as the paper can be *produced, such evidence is not admissible, but if its [538*] loss is established, it is otherwise. No difference is perceived between lost depositions and any other written testimony, except that if the witness was living, proof of the contents could not be made, as it would not be equal, as testimony, to the production of the witness himself. We are of the opinion that the contents of this deposition might be proved by any person who knew, and could testify as to its contents. Nor was the court below warranted in excluding this evidence, upon the ground of irrelevancy. The deposition of Speck gave a conversation between the witness and defendant in error, in which he gave his version of the difficulty. If plaintiff in error chose to do so, he had the right to make defendant's statements evidence. They tended to prove the issue in the case. As plaintiff in error claimed special damages, Burns' testimony was material, as it tended to prove malice. It is true that the statement from which it might be inferred was made after the occurrence, but it as fully showed the state of feeling on the part of defendant in error, as if it had been made at the time, or previous to the occurrence of the difficulty. It in fact was stronger evidence than if made at the time, as sufficient time had elapsed for passion and excitement to cool. Evidence of the contents of both of these depositions should have been admitted, and the court erred in rejecting it. The judgment of the court below is therefore reversed and the cause remanded.

Judgment reversed.

INDEX.

AGENCY.

Authority to loan confers no authority to collect.

Authority to an agent to loan the money of his principal and take security for its payment does not authorize the agent to collect his principal's money so loaned by him. *Cooley v. Willard*, 68

Nor in such case can the authority to collect the money be inferred from the fact that power of attorney and deed of trust, given to secure its payment, were taken in the name of the agent. Id., 68

Same; receipt of interest by agent making a loan.

Nor, in the absence of evidence of other collections having been made by him for the holder, does the fact that in such case the debtor paid the several installments of interest, as they fell due, to the agent who made the loan, who paid them to the holder of the note, who indorsed them upon the note in his hands, as paid by the hand of the person so receiving them, establish an authority to receive the principal, but is as much evidence that he was the agent of the debtor as of the creditor. And if the principal debt is paid by the debtor to such person, who fails to pay it over to the holder, the loss must fall upon the debtor. Id., 68

Liability of agent to principal for negligence.

It being the duty of an engine driver to sound the whistle or ring the bell at all places required by law, by a neglect to perform such duty he becomes liable over to his employers when they have been compelled to respond in damages for his nonperformance of such duty. *Chicago & R. I. R. R. Co. v. Hutchins*, 108.

ALTERATION OF WRITTEN INSTRUMENTS.

See CONTRACTS.

APPEARANCE

Waives defective process.

The only purpose of original process is to bring parties into court, and when the defendant enters his appearance, the object is accomplished, and it is not material whether the summons issued in the case was defective or not, or even whether it ever issued. *Dart v. Hercules*, 395

Not withdrawn by withdrawing plea.

By filing a plea in bar, a full appearance is entered, which is not withdrawn by withdrawing the plea. After it is withdrawn, the appearance still remaining, the plaintiff is entitled to judgment *nil dicit*, at any time before another plea is filed. Id., 395

ATTACHMENTS AGAINST BOATS AND VESSELS.

A dredge-boat not within the law.

The design of the act regulating attachments against boats and vessels (Rev. Stat. 1845, 71), and giving that remedy, for debts contracted for work, supplies or materials, etc., against "boats and vessels of all descriptions, built, repaired or equipped, or running upon any of the navigable waters within the jurisdiction of this state," was to give the remedy against vessels running upon our navigable streams and waters; and not against stationary structures. A dredge-boat, therefore, used in widening and deepening the harbor at Chicago is not within the meaning of the law. *Knisely v. Parker*, 481

BANKING LAW.

See CONSTITUTIONAL LAW.

BILLS OF EXCHANGE.

What amounts to an acceptance.

A promise by the drawee to pay an existing bill is an acceptance, or, in law, amounts to an acceptance, whether the bill was taken upon the faith of the promise or not. A promise to any person interested in having a bill paid inures to the benefit of the holder. *Jones v. Council Bluffs branch of the State Bank of Iowa.* 313

Failure of consideration of promise to accept.

Where the drawer of a bill transferred to the drawee all his interest in certain property, in consideration of the drawee's undertaking to pay the bill in question, the drawer agreeing that the net proceeds of such property should amount to a certain sum: *Held*, that, the agreements not being intended to be dependent on each other (the agreement to accept being for the benefit of the holder), the failure of the proceeds of said property to amount to the sum stipulated furnished no excuse for not accepting and paying the bill. Id., 313

What a sufficient demand of payment.

Where payment of a draft on a firm in Chicago, calling for "funds current to-day," was demanded in such bank notes as were received as current by the Merchants' Savings, Loan and Trust Company of Chicago, which was refused, but payment offered in depreciated Illinois bank notes: *Held*, that the demand of payment was sufficient. *Marc v. Kupfer*, 286

Testimony as to drawer's guarantying payment, immaterial.

In an action by the payee against the drawer of a bill of exchange, testimony to the point the payee would take the bill only on the responsibility of the drawer, and his alleged promise to guaranty it, is

immaterial; for by the very act of drawing, he guaranties its payment, on condition that, having funds in the hands of the drawee, the bill is presented to the drawee, payment refused and he duly notified of the refusal. *Kupfer v. Bank of Galena*, 328

When notice of dishonor is necessary.

Where the drawer of a bill of exchange has no funds in the hands of the drawee, nor any expectation of any, he is not entitled to notice of the refusal of payment by the drawee. Id., 328

But if the drawer has reason to expect there are funds in the hands of his drawee to meet his drafts when he draws them, as where railroad receipts for grain consigned to the drawee are attached to the drafts, of sufficient value to pay them all, he will be entitled to notice of refusal to pay them. Id., 328

Drawer bound by promise to pay made, after dishonor, with notice of the facts.

Where the drawer of a bill of exchange, with full knowledge of all the facts in relation to the nonacceptance or nonpayment of the bill drawn by him, promises the holder to pay the same, he will be bound by such promise. Id., 328

Promise by drawer to pay, only applies to drafts dishonored, and not to drafts paid but not remitted.

K. purchased wheat for P., and, by arrangement of the parties, consigned the same to the Bank of Peru, and drew drafts on that bank for the cost of the wheat, payable to the Bank of Galena, which drafts were sent by the Bank of Galena to the Bank of Peru, with instructions to remit, and were paid by P. Running accounts were kept between the two banks, and these drafts were charged against the Bank of Peru, and the account credited by remittances; certain drafts so sent were paid by P. to the Bank of Peru in the mode and manner expected by the Bank of Galena: *Held*, that for the failure of the Bank of Peru to remit the proceeds of such drafts so paid to it by P., the drawer K. could not be held liable as for the dishonor of the bill; and that his subsequent promise to pay his drafts dishonored by the Bank of Peru only embraced such drafts as had not been paid by P., and not the drafts so paid by him to the Bank of Peru. Id., 328

Accompanied by shipping receipt for grain shipped to drawee; payee not obliged to account for proceeds of wheat not consigned to him.

Where grain is consigned to a bank, and a bill of exchange drawn upon the consignee for its cost in favor of another bank, to which bill the railroad receipts for the wheat are attached, the payee having no control over the wheat, or any power to sell it, in an action against the drawer for the dishonor of his bill, there is no error in refusing an instruction that the plaintiff, the payee, before he can recover, if at all, must account for the value of the wheat. Id., 328

BONDS OF MUNICIPAL CORPORATIONS.

See ESTOPPEL. MUNICIPAL CORPORATIONS.

BONDS, OFFICIAL.

See SURETY.

CHALLENGE TO FIGHT A DUEL.

A letter inviting a challenge is not.

A letter contained the following: "It appears that a nife is your feverite of settling fuses and if so bea the case you can con sider that it will sute me you are a Cowerd and darsent to except of my offer. i want the same chanse of sharpening mi nife you can set your day and I will be on hans * * come uplike a man chuse your man an I will chuse mine this thing must be setteld iam not a cowerd:" *Held*, that this was not a challenge to fight a duel, but seemed rather to invite one. *Aulger v. The People*, 486

CHECKS.

See BILLS OF EXCHANGE. CURRENT FUNDS.

COMMON CARRIERS.

Undertaking to carry goods beyond termination of road.

Where a common carrier receives goods, and gives a receipt therefor stating that they are received for the consignee, at a specified place, beyond the termination of its road, to be forwarded by said carrier, it will be liable for a failure to transport said goods to their destination and there deliver them to the consignee, such receipt being considered an express agreement so to transport and deliver. *Illinois Cent. R. R. Co. v. Johnson*, 389

CONSTITUTIONAL LAW.

General banking law; subject to amendment.

Section 5 of article 10 of the Constitution of 1848, providing that "no act of the general assembly authorizing corporations or associations with banking powers shall go into effect, or in any manner be in force, unless the same shall be submitted to the people at a general election next succeeding the passage of the same, and be approved by a majority of all the votes cast at such election for or against such law," does not prohibit the amendment of the general banking law of 1851 except by a vote of the people. Like natural persons, in the exercise of their rights of organization and existence, banking corporations organized under said law are subject to the control of the legislature by general laws, and those rights which are not designed to be secured to them as property are subject to legislative control in the same manner as the general rights of an individual. The amendatory act of February 14, 1861, facilitating the remedy of a creditor of the bank against stockholders was not, therefore, required to be submitted to a vote of the people. *Smith v. Bryan*, 364

Change of remedy simply does not impair the obligation of a contract.

Every individual in the state is subject to such changes in the remedy provided for a redress of grievances, as the legislature may prescribe, and they will be enforced, if they do not impair the obligations of the contract on which the suit is brought. Id., 364

The act of February 14, 1861, entitled "An act to amend the general banking law in such a manner as to afford greater security to the public," and which does nothing more than to provide a more speedy remedy to a bank creditor, by which the liability of stockholders can be sooner reached than by the general law; and which simply provides that when a judgment is obtained against a bank, a stockholder may be made a party to it before execution issues against the bank; but which does not provide that execution shall issue against the stockholder before the property of the bank is exhausted, does not in any way impair or affect the obligation of the contract of the stockholders, and is not unconstitutional. Id., 364

Limitations upon power of the legislature.

A state legislature may do anything not inhibited by the constitution. But the prohibition need not be express; a repugnancy to the general provisions of the constitution will be a sufficient prohibition. *Chicago v. Larned*, 203; *Chicago v. The Home Bank*, 283

Clerk of court cannot be authorized to render judgment.

The rendition of a judgment by default and the assessment of damages are judicial acts, and belong to the judicial and not the ministerial part of the court. The clerk of a court, though attached to the judicial department, is only a ministerial and not a judicial officer of the court; he cannot, therefore, under article second of the constitution, dividing the powers of government into three distinct departments, and prohibiting members of one department from exercising any power properly belonging to either of the others, be authorized by the legislature to render judgment by default and assess damages thereon in vacation, and such a judgment is unauthorized and void. *Hall v. Marks*, 358

CONTINUANCE.

Of scire facias *upon a forfeited recognizance to enable sureties to surrender their principal.*

Where a person charged with a crime entered into a recognizance with sureties to appear at the December term, 1862, of the circuit court, at which term his recognizance was declared forfeited for his nonappearance, and a *scire facias* ordered to be issued against the accused and his sureties, to which the sureties appeared and pleaded at the April term, 1863, and the cause was then continued; and at the August term, 1863, the sureties moved for a continuance upon the affidavit of one of the sureties stating that on July 31st or August 1st, 1863, having procured certified copies of the recognizance and indictment of the principal, a power of attorney duly executed by his cosureties, and a letter from Gov. Yates of Illinois to Secretary Stanton, he went to Washington, D. C.; that owing to the strictness of the regulations adopted after the battle of Gettysburg and still in force, it was, as affiant was advised, useless to have gone sooner; that upon application to Secretary Stanton at Washington, an order to Colonel Hecker, in whose regiment in the army of the Potomac, the principal then was as a private soldier (he having, without the knowledge or consent of the sureties, enlisted before the forfeiture of his recognizance), directing him to surrender said principal, as well as any other authority for that purpose, was refused; that affiant was unable to obtain from the provost marshal, who alone had authority to grant it, a pass within the lines of the army of the Potomac; that said Gingrich being under military control, affiant was unable in any manner to ob-

tain his arrest; that affiant had incurred great cost for that purpose and believed that said principal could be arrested and surrendered, if a continuance was granted, which was not applied for for delay: *Held*, that, reasonable diligence having been used to arrest and surrender the principal, and the sureties having acted in good faith in their efforts to take him, under the peculiar circumstances of the case and the condition of the country, the cause should have been continued. *Gingrich v. The People*, 448

See Scire Facias.

CONTRACTS.

Consideration and failure thereof.

Where, upon the purchase of land, promissory notes are given by the purchaser, in consideration of the deed of conveyance and the covenants of seizin, and against incumbrances which it contains, the deed and covenants are a sufficient consideration to support the notes; and a breach of said covenants will not constitute a failure of the consideration of the notes. The remedy of the grantee in such case is upon the covenants in his deed. *Willets v. Burgess*, 494

Effect of an alteration of a written instrument.

The effect of an alteration in a written instrument depends upon its nature, the person by whom and the intention with which it was made. If neither the rights nor interests, duties nor obligations of either of the parties are in any manner changed, an alteration may be considered as immaterial. *Vogle v. Ripper*, 100

Effect of a fraudulent alteration.

A material alteration of an instrument fraudulently made by its holder justly deprives the wrongdoer of all rights by virtue of it. The identity of the instrument is thereby destroyed; and a party who voluntarily destroys the evidence of a debt agreed upon by the parties, ought not to be allowed to supply its place by other evidence. Id., 100

Thus, where a mortgagee has released or discharged the mortgage debt by a fraudulent alteration or destruction of the written evidence of it, he ought not to be permitted to sustain a suit for its recovery by bill to foreclose the mortgage. Id., 100

Effect of an alteration not fraudulent.

But where the alteration was not fraudulent, although the identity of the instrument may be destroyed, it will not cancel a debt of which the instrument was merely evidence. Id., 100

Where, on a bill to foreclose a mortgage, the bill alleged that the notes secured thereby were altered after their execution with the assent of the maker (being the mortgagor), and the grantee of the equity of redemption, so as to bear interest at ten per cent. instead of six per cent. as originally executed; and the answers denied that the alterations were made by consent, but did not aver that they were fraudulently made, although they averred that the identity of the notes was destroyed: *Held*, that the intention with which the alterations were made was a material fact, but not being put in issue by the answers the evidence in regard to it could not be considered; and the decree, of the court below for the sum which would have been due upon the notes, if they had not been altered, the interest being computed at six per cent., was affirmed. Id., 100

Effect of an alteration by a stranger.

An unauthorized alteration by a stranger ought not to destroy the rights of innocent parties, and it seems that such an alteration will not cancel a debt of which the instrument was merely the evidence. Id., 100

Rescission of contract for sale of land; notice.

Where one party fails in performing the contract at the proper time, the other, if he means to rescind it, should give a clear notice of his intention. It does not follow that because neither party is in a position to compel a specific performance, the contract is therefore rescinded. *Sanford v. Emory*, 468

Rescission must be mutual.

The rescission should be mutual, so as to discharge the vendor as well as the vendee. Id., 468

Where the vendor agreed to convey as soon as he was able to make title at which time the vendee was to make payment and execute a bond and mortgage for the unpaid purchase money; and the vendee was able to make title at any time after November 18, 1856, but did not tender a deed till January 30, 1859, but the vendee soon after making, the contract went into possession and erected a building on the premises and had not surrendered the possession when the deed was tendered: *Held*, in an action at law for the purchase money, that before the vendee could rescind, he was bound to restore or offer to restore the property, and that he had no right to claim all the benefits of the contract and at the same time insist it was rescinded. Id., 468

See VENDOR AND PURCHASER.

CONVEYANCES.

What will pass by a general quitclaim deed.

A general quitclaim deed purporting to convey all the right, title and interest of the grantor at law or in equity, in and to all lots and parts of lots in a specified city, will pass the grantor's interest in a term for life in lots in said city. *Prettyman v. Walston*, 175

See ESCROW; SWAMP LANDS.

CORPORATIONS.

Incorporation implied by appearing to a suit by the name, "United States Express Company."

Where garnishee process was served upon "The United States Express Company," as a creditor of a judgment debtor, the return stating that the president of the company not residing in the county in which the suit was pending, the writ was served upon the company as garnishee, by reading and delivering a copy thereof to H. C. & J. C. F., agents of the company, and on D. B. C., their clerk: *Held*, that, if the company was a corporation, the service was sufficient; and the garnishee having appeared by the above name, it was *held* that this was a sufficient admission that such was its name, and that the name itself imported that it was a corporation. *United States Express Co. v. Bedbury*, 459

See MUNICIPAL INCORPORATIONS.

COSTS.

See TRUSTS AND TRUSTEES.

COUNTY SEATS, REMOVAL OF.

Law authorizing an election.

Section 5 of article 7 of the constitution of 1848, providing that "no county seat shall be removed until the point to which it is proposed to be removed shall be fixed by law, and a majority of the voters of the county shall have voted in favor of its removal to such point," contemplates the passage of a law authorizing an election to be held, and prescribing the time when, and the place where it shall take place; the manner in which it shall be conducted and its results made known. Without such a law the proceedings at the election would be those of an unauthorized assemblage. *Board of Supervisors of Iroquois County v. Keady*, 293

See PARTIES IN CHANCERY.

CROSS BILLS.

See PRACTICE IN CHANCERY.

CURRENT FUNDS.

Check for, cannot be paid by depreciated bank notes.

The holder of a draft or check for "current funds" may demand in payment current money, par funds, or money circulating without any discount; and can not be compelled to receive depreciated bank notes. *Marc v. Kupfer*, 286

Meaning of term can not be contradicted or explained.

The term "current funds" has a specific legal and well-known meaning that cannot be contradicted or explained. Id., 286

A plea, therefore, that the term "current funds" in a draft, had a local meaning at the place where the draft was payable, and was understood there and throughout the state to mean such bank notes of the banks in Illinois, as were then in circulation, and which were then greatly below par, fluctuating in value from day to day, which was known to and understood by the parties; wherefore the instrument was not payable in lawful funds, was held bad on demurrer. Id., 286

CUSTOM.

Enters into contract.

It being the universal custom in this country for the engine driver to sound the whistle or ring the bell at all places required by law, that duty must, as it seems, be understood to enter into and form a part of his contract when employed by a railroad company. *Chicago & R. I. R. R. Co. v. Hutchins*, 108

DAMAGES.

Malice material, in trespass.

In an action of trespass for assault and battery, evidence of a conversation with defendant, in which defendant gave his version of the difficulty, and which tends to prove malice in the defendant at the time of making the assault, is material on the question of damages. *Aulger v. Smith*, 534

Measure of, on a breach of a covenant against incumbrances.

On a breach of a covenant against incumbrances, the grantee can only recover such damages as he has actually sustained. If by it the title has failed, and the premises have been lost, he may recover to the full extent of the covenant; or, if he has removed the incumbrance, he may recover the sum paid for the purpose, unless it exceeds the limits of the covenant. *Willets v. Burgess*, 494

But if he has not been disturbed in the title, or has paid nothing to remove the incumbrance, he can only recover nominal damages for the breach. If, however, eviction has taken place, he may recover substantial damages. Id., 494

EJECTMENT.

When notice to quit is necessary.

After long continued possession of land by a tenant, under a license to enter and occupy, whether he is to be treated as a tenant from year to year, or at will, he is entitled to notice to quit before an action of ejectment can be maintained against him. Where the entry is with a permission from the owner, the person entering is not a wrong doer, and cannot be until required by demand to surrender the possession, and refusal. *Chicago, B. & Q. R. R. Co. v. Knox College*, 195

When the entry is without consent, it is otherwise, as his possession is wrongful. So, where his occupancy subsequently becomes wrongful. Id., 195

Where a railroad company entered upon land in 1854 for its right of way, had the damages resulting therefrom duly assessed, and, with the consent of the owner, constructed and operated its road on the land; and the owner of the land brought an action against the company for the recovery of said assessment and recovered a judgment therefor, which was never satisfied; and subsequently, in 1859, brought an action of ejectment against the lessee of said company who was operating said road: *Held*, that, such lessee having succeeded to the rights of its lessor, and the lessor's entry having been rightful, eth action could not be maintained without first giving a notice to quit. Id, 195

Length of notice.

It may be that when the purpose of a rightful occupancy is not agricultural, a shorter notice will suffice, than where a question of emblements is involved. Still it would have to be reasonable, so as to afford the occupant reasonable time within which to surrender possession. Id., 195

Venue in ejectment; how proved.

In an action of ejectment, the fact that the land in controversy is situated

in the county where the suit was brought may be sufficiently proved by the number of the section, township, range and meridian, without specific proof of the county wherein it is situated. *Dart v. Hercules*, 395

EQUITY.

Defense at law.

The rule is well settled that where, by the use of ordinary diligence and precaution, a defense could have been made available upon the trial of a suit at law, no relief will be granted in equity. *Ramsey v. Perley*, 504

Where, therefore, a bill filed by a surety to recover back moneys paid by him, alleged that with and as surety for F., he executed a promissory note to P., which not being paid at maturity, a suit was brought and judgment recovered thereon, which was paid by complainant; that the note contained usury, and that by subsequent agreements for usury between F. and P., the latter extended the time of payment, whereby complainant was discharged; that complainant had no knowledge of the usury or subsequent agreements until after recovery of the judgment against him and its payment, and that F. was insolvent; but the bill contained no allegation that these defenses could not have been successfully made in the suit at law, if they had been known, nor that complainant used any diligence whatever to ascertain whether he had a defense or not: *Held*, that until the contrary was shown, it would be presumed that by the exercise of due diligence complainant would have been informed of the facts alleged by him; that reasonable diligence required him to inquire of F., if there was any defense which could be made to the action, and that the bill was bad on demurrer. Id., 504

Where, for a failure to convey within the stipulated time, an action was brought against the obligor for the use of the assignee of a penal bond conditioned for the conveyance within one year to the obligee or his assignees, of a certain tract of land; and pending said action, but before the trial, the obligor caused to be executed and delivered to the assignee, who was in possession of the premises, a deed sufficient to vest in him a perfect title thereto, which deed was received by the assignee, subject to, but not waiving any claim by reason of not receiving the title at the proper time; whereupon the obligor filed a bill setting forth the facts and alleging various excuses for not having caused the deed to be executed before that time: *Held*, that the title to the premises having become vested in the assignee, for whose use the suit was brought, its acceptance was either an absolute bar of the action at law, or a bar *pro tanto* in mitigation of damages; that his excuses for the delay in not causing the deed to be made, if valid, were all proper to be considered as matters of defense at law; and, therefore, having as complete and ample opportunity to assert his rights in law as in equity, there was no reason for the exercise of equitable jurisdiction. *Beauchamp v. Putnam*, 378

See INJUNCTION.

ERROR.

Matters of discretion not reviewable on.

Matters resting in the discretion of the court below, as setting aside a judgment by default, are not to be reviewed or corrected on error. *United States Express Co. v. Bedbury*, 459

Not presumed; defense admissible under general issue presumed to have been so made, though the special plea setting it up is stricken out.

Where the general issue, *non assumpsit*, is pleaded, and also a special plea, all the matters set up in which are admissible under the general issue, and the special plea is stricken from the files; the defense therein set up being admissible under the general issue, in the absence of anything in the record to the contrary, it will be presumed that the defendant availed himself of the right to make such defense under the general issue, and consequently the defendant having suffered no injury by striking out the plea, the judgment will not on that ground be reversed. *Illinois Cent. R. R. Co. v. Johnson*, 389

Working no injury, not ground for reversal.

Even if a demurrer to some of the defendant's special pleas has been improperly sustained, the supreme court will not reverse the judgment where the defendant has had the full benefit of his defense set up in said pleas, under the general issue. *Jones v. Council Bluffs branch of the State Bank of Iowa*, 313

Admission of improper evidence, when not.

A defendant can not complain of the admission of evidence alleged to be inadmissible in support of certain allegations of a bill, which are not sustained and are decreed against by the court. *Vogle v. Ripper*, 100

ESCROW.

Delivery in.

It is generally true, that, if a deed is delivered to a stranger to be delivered to the grantee on the performance by him of certain conditions, and they are fully performed, and the deed delivered, the deed takes effect from the second delivery, and is to be considered the deed of the party from that time. *Price v. Pittsburg, F. W. etc. R. R. Co.*, 13

A question of intention.

But in all such cases the *bona fide*, lawful intention of the parties is to be considered, and if it appears that the parties intended the deed should take effect from the day of its execution, if the condition was performed, and it is fully performed, it will so take effect. (The question of intention in this case was left to the jury.) Id., 13

Delivery to agent of the grantee.

In order to constitute a delivery in *escrow*, the deeds must be delivered to a stranger. Where, therefore, they were delivered to the solicitor of the grantee, a railroad corporation, since a corporation can only act through its officers and agents, such delivery was considered a delivery to the corporation itself, taking effect immediately. Id., 13

ESTOPPEL.

Of town to set up irregularity in issue of its bonds.

The second section of the special charter of the town of Keithsburg (Priv. Acts 1857, 868) expressly authorized the president and trustees to subscribe for stock in a railroad company to an amount not exceeding $20,000, and to issue the bonds of the corporation in payment therefor; the seventeenth section purported to legalize and confirm a subscription theretofore made by said corporation to the railroad com-

pany, while the town was acting under the general incorporation act of 1849; the bonds were not issued till after the enactment of the special charter: *Held*, that whether the bonds were issued by virtue of the second or of the seventeenth section of the act of 1857, the corporation was estopped from setting up any irregularity in their issue, inasmuch as it had repeatedly recognized their validity by paying them out, levying taxes and paying the interest on them for a series of years. *Town of Keithsburg v. Frick*, 405

By decree of partition.

The defendant in a suit for a partition, in which the premises in controversy are set off to the complainant in partition, cannot maintain ejectment against one claiming under such complainant. The judgment or decree of a court having jurisdiction binds the parties, and is available to all persons claiming under either of them. *Doolittle v. Don Maus*, 457

See INJUNCTION. LANDLORD AND TENANT.

EVIDENCE.

Affidavit to lay foundation for parol proof of contents of bill of exchange.

In an action by a bank against the drawer of a bill of exchange, an affidavit by the managing agent of the bank that the bill was sent to the bank upon which it was drawn; that affiant applied to the drawee for it, but was told it was not there, and that the former cashier of the drawee had absconded to Canada and taken it with him or destroyed it; that thorough search was made by the officers of the bank upon which it was drawn, for it among the papers and files of the bank, but that it could not be found, is sufficient to warrant the admission of parol proof of its contents. *Kupfer v. Bank of Galena*, 328

Preliminary proof to authorize introduction of record copy.

Under the statute (Sess. Laws, 1861, 174) — providing that wherever upon the trial of any cause, any party thereto, or his agent or attorney in his behalf, shall orally in court or by affidavit to be filed, make oath that the original of any deed, conveyance, or other writing of or concerning lands, which may have been acknowledged or proved according to any law of this state, and which by virtue of such law shall be entitled to be recorded, is lost or not in the power of the party wishing to use it on the trial, the record of such deed as certified by the recorder in whose office it may have been recorded may be read in evidence in any court with like effect as though the original deed, etc., was produced and read — where the preliminary proof is the affidavit of one of the plaintiffs, and of their counsel and attorney, the first stating that he had not in his possession, power or control, the lease declared on, and the second stating that he had never had, since the commencement of the suit, the original lease set out in the declaration, and had never seen it, and that it was not within his possession, control or power to produce on the trial; the lease having been properly acknowledged and recorded, a record copy may properly be admitted in evidence. *Prettyman v. Walston*, 175

Record copy admissible where grantee does not produce the original upon notice.

Where notice is given to the grantee in a deed to produce the original which is presumed to be in his possession and under his control, and it is not produced, a record copy of the deed is competent evidence. Id., 175

What passes by a general quitclaim deed, open to proof.

Where a general quitclaim deed purported to convey certain tracts of land in a certain county, and also "all of our [the grantors'] right, title and interest at law or in equity in and to all lots and parts of lots" in a certain city in said county: *Held*, that it was open to proof what passed by the general description in the deed. Id., 175

Ex parte affidavits inadmissible.

The *ex parte* affidavit of a third person, if objected to, is inadmissible as evidence, and amounts to no more than hearsay. *Manny v. Stockton*, 306

Copy of record of survey by county surveyor, certified by his successor, admissible.

In an action to recover a penalty for obstructing a public highway located on a section line, in which the whole controversy is as to the location of the line, a copy of the record of a survey of an adjoining section, made by a county surveyor since deceased, and duly certified by the subsequent incumbent of the office, which tends to establish the common corner of four sections, forming one end of the line in dispute, is, under the statute (Rev. Stat. 1845, 524, sec. 7) providing for the recording of surveys, and that a certified copy of a survey under the hand of the county surveyor shall be admitted as *prima facie* evidence in any court of record of this state, admissible in evidence, and it is error to exclude it. *Waterman v. Raymond*, 42

Effect of survey and plat as evidence.

The survey and plat of a public road made and returned by the highway commissioners, when they located it, is legitimate evidence as to the location of the road, but is not conclusive as to where the place or precise line may be found, but is open to correction by parol evidence. Like the field notes of the government surveys, they always control, unless it is made to appear that lines and corners are different from the calls of the field notes. When the original line or corner is found, and it conflicts with the calls of the field notes, the former must govern. *Hiner v. The People*, 297

Admissions.

Where, upon the trial of a cause, the court permits a witness to testify to a part of the testimony given by a party to the cause on the trial of a former cause, it is error to refuse to allow the witness to testify to the balance that was then said by such party. Such testimony is in the nature of an admission by the party, and when made evidence by one party, the other has a right to call for the whole statement. *Aulger v. Smith*, 534

Of contents of lost deposition.

Where the deposition of a witness taken and read on the trial of a former cause is lost and the witness dead, the contents of such deposition may, when material, be proved by any person who knows and can testify as to its contents. There is no difference in this respect between lost depositions and any other written testimony, except that, if the witness is living, proof of the contents cannot be made, as it would not be equal, as testimony, to the production of the witness himself. Id., 534

To overcome sworn answer.

Where the sworn answer to a bill in chancery does not deny any material allegation in the bill, the doctrine that it must be overcome by two witnesses has no application. *Forbes v. Hall*, 159

Identity of property stolen, how proved on trial of indictment for receiving stolen goods knowing them to have been stolen.

Upon the trial of an indictment for receiving brass couplings, knowing them to have been stolen, it is proper for the purpose of identifying and proving the kind of property stolen, for the people to bring a brass coupling into court and show by the testimony of witnesses that the couplings stolen were similar to the one brought into court and shown to the witnesses. But this kind of evidence was unnecessary. Proof that the articles were brass couplings that had been stolen, and that the prisoner knew it, would have made out the case. *Jupitz v. The People*, 516

Expert testimony.

Where, upon the trial of an indictment for receiving twelve brass couplings, knowing them to have been stolen, it was in proof that the prisoner kept a junk shop on one of the principal streets of Chicago, and bought the couplings for what, if they were adapted to present use, was far below their real value; but it appeared that they were bought openly, publicly, in daylight and in the usual course of business, and that the purchaser paid no attention to the articles, and had purchased articles of the same individual previously; that the couplings were brought in a bag, emptied out on the scales, weighed as old brass, paid for as such, and thrown into a barrel standing in the room: *Held*, that testimony of witnesses called on behalf of defendant to prove that they were machinists and brass finishers of large experience, and that from common observation and without close inspection it could not be told whether couplings, such as the one shown the witnesses in the case for the purpose of identification and which was shown to be similar to the ones stolen which were not produced, were perfect or imperfect, whether they were of any use for the purpose for which intended, or merely valuable as old brass to remold, was admissible, as it would have a tendency to rebut the presumption of guilty knowledge arising from inadequacy of price paid; and that the rejection of such evidence was error. Id., 516

Of good character of accused in criminal cases.

In all criminal cases, whether the case is doubtful or not, evidence of good character is admissible on the part of the prisoner. Id., 516

Same; on trial of indictment for receiving stolen goods.

Where, upon the trial of a junk dealer for receiving stolen goods (brass couplings) knowing them to have been stolen, there was no direct proof of guilty knowledge, but only the presumption of guilt arising from the fact that the price he paid was far below their real value if the articles were adapted to present use, which was not clearly established; and the defendant requested an instruction, that the evidence of good character for honesty introduced by defendant should have great weight in determining as to his guilt or innocence, and that if they found that the defendant had theretofore borne and then bore a good character for honesty, it should have great weight in his favor, which the court qualified by adding the words, "if the jury believe there is any doubt of his guilt:" *Held*, that the instruction as qualified was objectionable on the ground, inferable from the qualification, that the court did not consider evidence of good character of any weight except in a doubtful case. Proof of uniform good character in such a case is entitled to great weight, and should raise a doubt of guilty knowledge. Id., 516

See Possession. Presumptions. Promissory Notes. Swamp Lands.
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FERRIES.

Forfeitures under the general law must be declared by some judicial proceeding.

By section 11 of the general law regulating ferries (Scates' Comp., 526; Rev. Stat, 1845, 255), making a person running a ferry without authority within three miles of an established ferry, liable to forfeit his boat to the owner or proprietor of a ferry established under the provisions of that act, or confirmed as such by the tenth section of said act, and authorizing the proprietor "after a forfeiture had occurred, to enter upon and take possession of the boat or craft to his own use," the legislature did not intend the forfeiture should be declared by the party injured; and the proprietor of the established ferry cannot lawfully take possession of the boat till this is done by some judicial proceeding; and if he takes possession without a forfeiture having been declared by some court of competent jurisdiction, his taking will be tortious. *Gear v. Bullerdick*, 74

Party acting under a special charter cannot enforce a forfeiture under the general law.

A person not claiming a ferry franchise under the general law, but under a special act conferring no power to declare a forfeiture for running another ferry at the same place, can not resort to the summary remedy conferred by the general law, and has no right to seize and detain the boat of another person running to the same landing; but, if he has an exclusive franchise, must seek his remedy at the common law. Id., 74

Forfeitures under the general law not applicable to ferries across the Mississippi river.

The forfeiture imposed by the general law regulating ferries, for running a ferry within three miles of an established ferry, was only intended to apply to parties who should, without authority, run and operate ferry boats across the rivers of this state, and does not apply to one licensed by the proper authority in the state of Iowa to run a ferry from a landing in Iowa to the Illinois shore. The middle of the main channel of the Mississippi being the boundary between the two states, the authorities of Illinois have no greater right to grant a franchise, to be enjoyed beyond its boundary, than Iowa has to grant one to be enjoyed beyond its boundary, and for an injury to the proprietor licensed in this state, or a trespass upon his landing by the party licensed in Iowa, he must seek his remedy at the common law, and not by seizure of the boat; and if he seizes the boat, replevin will lie for its recovery. Id., 74

FIXTURES.

Right of removal as between vendor and purchaser of land under an executory contract; replevin therefor.

Where the purchaser of a city lot under a contract of purchase — providing that, upon default of payment, the vendor might terminate the agreement and treat the vendee, his representatives or assigns, as tenants at will at a specified rent — while owing the greater portion of the purchase money, in default for payments matured, and paying no rent for his occupation of the premises, conjointly with defendant under an agreement that each should own half thereof, erected on the 263

premises a dwelling house placed upon blocks resting on boards lying on the ground, and afterwards sold his share to defendant who removed it from the lot: *Held*, that while in the enjoyment of the property under such circumstances, the purchaser could not honestly assert that he did not intend to perform his contract, and that he intended the erection on the lot as property separate from the freehold, and therefore, neither he nor his vendee, the defendant, could rightfully remove it from the premises; and that, so long as the house could be identified and was not permanently annexed to other realty, replevin was sustainable therefor. *Ogden v. Stock*, 522

See Replevin.

FORMER RECOVERY.

When a bar to action against agent.

Where an action is brought against a railroad company to recover damages for the negligence of an engine driver on its road in omitting to sound the whistle or ring the bell at a place required by law, a verdict finding no negligence will, as it seems, be a bar to a recovery against the engine driver for the same cause of action. *Chicago & R. I. R. R. Co. v. Hutchins*, 108

FRAUDULENT CONVEYANCES.

By father to minor son.

Where a father purchases and pays for land, and has the conveyance made to his minor son, the fact that the son pays no portion of the purchase money, does not render the transaction fraudulent as against subsequent creditors. *Mixell v. Lutz*, 382

It seems that such a transaction would not be fraudulent as against existing creditors, unless it also appeared that the deed was so made for the purpose of hindering and delaying them. Id., 382

Void only as to a creditor who has been defrauded.

A voluntary conveyance, intended to defraud existing creditors, is valid and binding until avoided by some creditor who has been defrauded. Persons afterwards giving credit have no right to complain, as they did not look to the property as security for their debts. Id., 382

GARNISHMENT.

By what name defendants are to be described.

Under the seventh section of the attachment act (Rev. Stat., 1845, 65, Scates' Comp., 229), declaring that in original attachment proceedings defendants may be designated by their reputed names, by surnames, and joint defendants by their separate or partnership names, or by such names, styles or titles as they are usually known; and the statute (Rev. Stat. 1845, 307, sec. 38; Scates' Comp., 549) providing for the garnishment of the creditors of judgment debtors, declaring that the court may proceed against garnishees in the same manner as is required by law in original attachment suits, it is sufficient if the defendants are described in the garnishee proceedings by their firm name,

by the style or title by which they are known. In this case, the defendant was known and garnished by the style, The United States Express Company, and it was *held* that, if they composed a partnership, they were properly sued, and if a corporation, the designation was correct. *United States Ex. Co. v. Bedbury*, 459

GOVERNMENT LANDS.

Land Officers cannot divest the equitable title conferred by legal entry.

Where the entry of land is legal, the government land officers can not by any act of theirs divest the equitable title acquired by the purchaser without his consent or the consent of his assignee, and confer the same upon a subsequent purchaser with notice. *Forbes v. Hall*, 159

GUARDIAN.

Liable for money loaned without securiy, etc.

Where a guardian loans his ward's money without security and without the approval of the court, if the money is thereby lost, he will be chargeable therefor with interest. *Gilbert v. Guptill*, 112

Where the office has expired, guardian may be interrogated concerning his accounts.

A guardian voluntarily rendering an account and submitting himself to the jurisdiction of the probate court may be interrogated by the court as to its correctness, and upon his guardianship generally, and cannot thereafter object that his office has expired, and that the court has no jurisdiction by citation to compel a report. Id., 112

Guardian compelled to testify.

The proceedings upon a citation of a guardian to account before the probate court may be likened to a bill for a discovery against the guardian, and it seems he may be compelled to testify concerning the estate of his ward. Id., 112

See Interest.

HIGHWAYS.

Vacation by failure to open within five years.

Under section 17 of the statute (Sess. Laws, 1854, 27; Scates' Comp., 364), regulating township organization and declaring that, unless a public road laid out by order of the commissioners of highways shall be opened within five years, the same shall become vacated, such non-user for the limited period operates as an abandonment, and remits the owners of the land which had been condemned for the use of the public, to their former rights in the property. *Green v. Green*, 320

And whether the right of way has been obtained by release or by condemnation or payment of damages, the right of the owner to resume the exclusive use and occupancy of the land is complete and unqualified after such abandonment. Id., 320

To avoid vacation the entire length must be opened.

Where the road petitioned for, surveyed and established, is an entirety, to avoid the vacation of the road, it must be opened its entire length within five years from the time of its location. That effect cannot be avoided by opening portions within the time. Id., 320

See Evidence. Injunction.

INJUNCTION.

To restrain opening of road which would produce irreparable injury.

Where a road was located across a township on the 27th day of June, 1857, and on the 26th of June, 1862, the commissioners of highways proposed to open that portion passing through complainant's farm, then inclosed and under cultivation; and it would have been impossible to open the whole road before the expiration of the five years prescribed by the statute: *Held*, that, as to permit the commissioners to proceed would result in no benefit to the public, as the day after the opening of the road the complainant might rightfully close it up, and prevent travel over that portion crossing his land; and as, if opened, although injurious to complainant, it would be done under color of law so that the commissioners could justify the act in an action for damages, the case came within the rule that equity will restrain an act which, if performed, would produce irreparable wrong and injury, and that the opening of the road would be perpetually injoined.

The fact that in such case the complainant, in consideration of obtaining the road as located across the township, released the right of way for the road over his premises, will not estop him from objecting to its being opened, as, having failed to obtain the road, it would be unjust to hold the right under the release, and yet deprive him of the consideration that induced the release. *Green v. Green*, 320

INSTRUCTIONS.

"*Believe from the evidence.*"

An instruction which does not contain the words, "from the evidence," after the word "believe," is erroneous in form; but the appellate court will not reverse a judgment for that defect, unless it appears that the jury were misled thereby. *Holliday v. Burgess*, 193

Error to assume the guilt of accused.

Where, upon the trial of an indictment, the defendant requested an instruction that if the jury found from the evidence that the defendant had theretofore borne and still bore a good character for honesty it, should have great weight in his favor, which the court qualified by adding the words, "if the jury believe there is any doubt of his guilt:" *Held*, that the qualification was objectionable as amounting to a declaration by the court that there was no doubt of the prisoner's guilt. *Jupitz v. The People*, 516

INSURANCE.

Policy not assignable.

A fire insurance policy is not assignable so as to enable the assignee to bring suit upon it in his own name. *Peoria M. & F. Ins. Co. v. Hervey*, 46

Where there is a new contract with the assignee of the policy.

But where the owner of the insured property, upon the sale of it by his to the plaintiff, with the consent of the insurers, assigned the insurance policy thereon (which was under seal) to the plaintiff, and the insurance company, in consideration of the payment of a certain premium by the plaintiff, issued to him a receipt stating that the insurance company, in consideration of such payment by the holder of said policy, thereby consented to the continuance for one year of the risk originally issued in said policy, the original application to remain in full force and virtue: *Held*, that this constituted a new contract with the plaintiff for a valuable consideration paid, and in the terms of the original policy; and that, admitting that the assignee could not sue upon the original policy assigned, still, this being a new contract with the plaintiff, he could maintain assumpsit upon it in his own name. Id., 46

INTEREST.

On money in guardian's hands after his ward's majority.

Where a ward requested his guardian to have his money ready for him on his majority, but it was not demanded for some years thereafter it was *held*, that as after the ward's majority the guardian would have no right to loan the money or use it in any manner, but be bound to have it on hand to pay over on demand, he should not be charged with interest thereon after the day his ward arrived at full age till such demand, unless it could be shown he made profits out of the money. *Gilbert v. Guptill*, 112

See USURY.

JUDGMENTS.

Stating an account is not.

The finding of a certain sum due upon the statement by the court of a guardian's account, and directing him to pay it over to the administrator of the ward, although it fixes the amount of the recovery upon the guardian's bond and is *res adjudicata* as to the amount, is not the entry of a judgment against the guardian. *Gilbert v. Guptill*, 112

Judgment by confession not erroneous, if within the amount laid in the ad damnum.

Where the amount of a judgment by confession upon a promissory note is within the amount laid in the *ad damnum* in the declaration, the judgment will not be reversed in error, although it exceeds the amount of the note, interest and attorney's fee, for which the warrant of attorney authorized confession of judgment. Application in such cases should be made in the circuit court, where the judgment was rendered, to correct it. *Iglehart v. Morris*, 501

Sufficient if record recites proof of warrant of attorney.

Where the record of a judgment by confession recites that the execution of the power of attorney to confess the judgment was duly proved; upon error brought, this will be sufficient, although no affidavit was filed of the execution of the warrant of attorney. Id., 501

Right of plaintiff to have judgment by confession vacated.

A judgment entered in vacation by confession under a warrant of attorney, being for the plaintiff's benefit, he is entitled, upon the trial of the issues joined upon pleas (which the defendant is subsequently allowed to put in), and before the cause is submitted to the jury, to have the same vacated on his motion, and the parties remitted to their original positions. Submitting to a nonsuit will operate to vacate the judgment, as that rests on the recovery on the issues made up in the cause. *Gordon v. Goodell*, 429

Held for plaintiff's security upon defendant's being allowed to plead.

Where, after the entry of a judgment by confession under a warrant of attorney, the defendant is allowed to plead, the usual practice is not to vacate the judgment, but to hold the same for the security of the plaintiff till after the trial of the issues joined in the cause. Id., 429

JUDGMENT LIENS

Prior sale under a junior judgment will not affect the right of a subsequent purchaser under a prior judgment.

A sale of land on execution issued on a junior judgment, although such sale is prior in point of time, will not affect the right of a prior judgment creditor to have his judgment satisfied by a sale of the same lands sold under the junior judgment, provided execution is issued on the prior judgment within a year from the last day of the term in which it was rendered, and a sale made within seven years. *Kirk v. Vonberg*, 440

Territorial extent of lien of judgments of Municipal Court of Chicago.

The act creating the Municipal Court of Chicago (Sess. Laws 1837, 75) gave it concurrent jurisdiction with the circuit court of all matters arising within the city, and provided (sec. 80) for the enforcement and collection of its judgments in the same manner as judgments of the circuit courts of the state; and the supplemental act of March 4, 1837 (Sess. Laws, 81), declared that it should have concurrent jurisdiction with the circuit court in all matters arising within the county. The judgments of the circuit courts being by statute liens upon all lands of the defendant within its jurisdiction, and the jurisdiction of the circuit court being co-extensive with Cook county: *Held*, that the judgments rendered by the Municipal Court were liens upon all of the lands of the judgment debtors within the limits of the county, although beyond the limits of the city of Chicago. Id., 440

See JURISDICTION.

JUDICIAL SALES.

Under judgment void for want of jurisdiction.

A dredge-boat not being liable to attachment and sale under the act regulating attachments against boats and vessels (Rev. Stat. 1845, 71), a sale thereof under a judgment in such a suit, where there is no personal service on the owner, will be void for want of jurisdiction of the subject matter, and the purchaser will acquire no title thereby. *Knisely v. Parker*, 487

JURISDICTION.

Defined.

Jurisdiction is defined to be a power constitutionally conferred upon a judge or magistrate to take cognizance of and decide causes according to law, and to carry his sentence into effect. *Kirk v. Vonberg*, 440

Judgment lien, a part of the jurisdiction of circuit courts.

The judgment lien created by statute, from the last day of the term, upon all the real estate of the judgment debtor in the county in which the circuit court wherein the judgment is rendered, is held, appertains to and is a part of the means of enforcing the sentence of the court; and hence is a part of the jurisdiction of the circuit court. Id., 440

Jurisdiction of superior court of another state presumed.

While the jurisdiction must affirmatively appear upon the record, when the question comes up directly upon appeal, or by writ of error; yet, when the question is raised collaterally, upon a judgment rendered by a superior court in another state, it will be presumed, in the absence of proof, that the court rendering the judgment had jurisdiction. *Dunbar v. Hallowell*, 168

Where, therefore, in an action upon a judgment rendered in a superior court of the state of New Jersy, the record did not show affirmatively that there was service of process upon the defendant, nor that there was not, but was simply silent, it was *held*, that the judgment itself was *prima facie* evidence of jurisdiction. Id., 168

Conflict between the jurisdiction of states and the federal courts: Interference with final process.

Neither a state nor federal court has any right to interfere with or control the proceedings or process of the other. *Munson v. Harroun*, 422

Where, therefore, a writ of *fieri facias* from a circuit court of the United States is levied by the marshal upon property which is claimed by a stranger, while such claimant may bring trespass or trover in the state court against the marshal for the alleged wrongful seizure of his property, since replevin would work an interference with the process of the federal court, that action cannot in such case be maintained against the marshal for the recovery of the possession of the property. Id., 422

LANDLORD AND TENANT.

Tenant presumed to hold over subject to the terms of his lease.

Where a tenant occupying land under a parol lease holds over, without any new agreement as to rent, after the expiration of his term, and after the sale of the land by his landlord, such holding over will be construed to be a holding over under the terms of the lease, and the same rate of rent may be recovered from the tenant by the vendee of the landlord in an action of assumpsit for use and occupation. *Price v. Pittsburg, F. W., etc., R. R. Co.*, 13

What amounts to an eviction.

Physical and forcible expulsion is not necessary to constitute an eviction;

but any act on the part of the landlord, done in violation of the rights of the tenant, and without his consent, and which deprives him of the beneficial enjoyment of the premises, amounts to an eviction. Id., 13

Where land was devised to a tenant with the understanding that it might during the term be sold to a railroad company, and that in that event a railroad track might be laid across it; and the tenant held under that understanding: *Held*, that putting down the track after the purchase by the railroad company did not amount to an eviction so as to release the tenant from payment of rent. Id., 13

Lessee cannot deny landlord's title.

Where the owner of the fee accepts a lease of the premises from another and goes into possession under it, neither he, nor his assignee, can dispute the lessor's right to demise, at least not until he shall have surrendered the possession to him. *Prettyman v. Walston*, 175

Where the owner of certain premises in fee took a life lease thereof from another, and went into possession of the premises thereunder; and subsequently, while so in possession, the premises were sold one execution against him, but the purchaser at the execution sale did not take possession till several years thereafter, when, the execution debtor having executed to him a deed of the premises, he went into possession, and held the premises by his tenants: *Held*, that the inference was irresistible that he went into possession under the deed from the execution debtor, and not under his sheriff's deed; that he thereby became the assignee of the whole term; and that, as the covenants ran with the land, the lessor could maintain an action against him for the stipulated rents. Id, 175

LEGAL TENDER ACTS.

Deposits of gold before passage of legal tender acts; in what payable.

Where, in 1861, before the passage of the several acts of congress making treasury notes a legal tender, gold coin was deposited in a bank to be drawn out in gold: *Held*, that the bank had no right to make the depositor's checks for currency a charge against his deposit of gold; and that the depositor was entitled, if paid in currency at a discount, to have the amount of that discount allowed him, or, in other words, he was entitled to receive of the bank the premium at which gold was sold over currency for the whole amount deposited, unless he agreed to receive currency as coin. *Kupfer v. Bank of Galena*, 328

LIVINGSTON COUNTY.

See SWAMP LANDS.

MORTGAGES.

Redemption barred only by foreclosure.

The mere fact that a mortgage declares that the title shall vest in the mortgagee, if prompt payment is not made, cannot bar a redemption, That can only be done by a foreclosure. *Willets v. Burgess*, 494

Eviction under a mortgage, when divests title.

An eviction of a subsequent purchaser of land, under a prior mortgage without a foreclosure, does not change the title to the property. It would still remain subject to redemption, and the title in such purchaser subject to the mortgage. Id., 494

But it would be otherwise, where there is an eviction under a foreclosure, as then the title would be divested out of such purchaser. Id., 494

MUNICIPAL CORPORATIONS.

May be authorized to subscribe for stock in railroads without previous vote of citizens.

It is competent for the legislature to confer directly upon a municipal corporation the power to subscribe for stock in railroads, without any previous vote of the town or city in favor thereof. *Town of Keithsburg v. Frick,* 405

In this case, such power was conferred upon the president and trustees of the town of Keithsburg, by section 2 of the act of 1857, incorporating that town (Private Acts 1857, 868); and hence all question about the election held to authorize such subscription, or the fairness of it, was *held* to be foreign to the case. Id., 405

Subscription of stock in, and issue of bonds by town of Keithsburg to Warsaw & Rockford R. R. Co.

Where, in November, 1855, it was voted by the citizens of the town of Keithsburg, incorporated under the general incorporation law of 1849, that the corporation subscribe $20,000 to the capital stock of the Warsaw & Rockford Railroad Company; and subsequently, on the 16th of February, 1857, a special charter was granted incorporating said town, the second section of which authorized the president and trustees of said town to subscribe for and take stock to an amount not exceeding $20,000, and to issue the bonds of the corporation in payment therefor; and the seventeenth section of which purported to legalize and confirm said prior subscription to the full extent and purpose for which it was made; and on May 4, 1857, an ordinance was passed by the town authorities reciting said election, and said section 17 of said special charter, and authorizing the subscription of $20,000 to the capital stock of said railroad company, and the issue of bonds in payment therefor, which were, without any further vote therefor by the people, accordingly issued on June 1, 1857: *Held*, that said bonds were not issued by the corporation organized under the act of 1849, but under the authority of the special charter of 1857; that any question as to the power of the legislature to confirm the subscription, if made under the act of 1849, was foreign to the case; and that the subscription and the bonds issued in payment thereof were valid. Id., 405

Legalization of subscription by a subsequent enactment.

It seems, that a subscription to the capital stock of a railroad company, made in pursuance of a vote by the citizens of a town incorporated under the general incorporation act of 1849, may be legalized and confirmed by a subsequent enactment. Id., 405

MUNICIPAL COURT OF CHICAGO.

See JUDGMENT LIENS.

NEW TRIAL.

Verdict against the evidence.

Although the evidence in support of a verdict may not be entirely free from doubt, still if the verdict is not clearly against the weight of the evidence, it will not be disturbed. *Chicago & R. I. R. R. Co. v. Hutchins*, 108

Where the evidence is conflicting, it is the province of the jury carefully to consider the whole evidence; and their verdict in such case will not be set aside unless manifestly against the weight of the evidence. *Hiner v. People*, 297

It is error to refuse a new trial where the verdict is manifestly against the evidence. *Henry v. Eddy*, 508

NONSUIT.

Plaintiff has a right to submit to, if applied for in time.

Under section 29 of the practice act (Rev. Stat. 1845, 417), providing that "every person desirous of suffering a nonsuit on trial shall be barred therefrom, unless he do so before the jury retire from the bar," a plaintiff has, by implication, a clear right to suffer a nonsuit on trial if he makes his motion in time. *Gordon v. Goodell*, 429

When, therefore, a judgment by confession had previously been entered in vacation on the cause of action then on trial, by virtue of a warrant of attorney; and pleas had been put in by defendant by leave of court, without, however, vacating the judgment which was held for plaintiff's security; and the plaintiff, after the evidence was closed and before the cause was submitted to the jury, asked leave to take a nonsuit, which was refused: *Held*, that the motion for leave to take a nonsuit being in time, should have been allowed, notwithstanding the judgment. Id, 429

PARTIES IN CHANCERY.

Complainants in bill to restrain removal of county seat.

As to whether an injunction bill filed by citizens of the county against the board of supervisors to restrain the removal of the county seat is the proper mode of bringing the question before the court, *quære*. *Board of Supervisors of Iroquois County v. Keady*, 293

An act of administration likely to produce taxation is not, ordinarily, a matter of private or individual concern, but an affair altogether public, and the appropriate remedial process against an abuse of administrative power tending to taxation, would seem to be a proceeding in behalf of the state. Id, 293

PARTNERSHIP.

Firm money deposited in name of individual partner.

Where the money of a firm is, as a matter of convenience and by agreement of the parties, deposited in bank in the name and on the account of one of the partners, but is not under the exclusive control of the part-

ner in whose name it is deposited, the other partner procuring checks at all times when desired for use in the business of the firm; and such money is, for convenience, to indicate in which partner's hands the funds are, charged upon the firm books to the partner in whose name it is deposited; in case of a loss of the funds by the failure of the bank, such loss will be chargeable to the firm and not to the partner in whose name deposited. *Campbell v. Stewart*, 151

PAYMENT.

What constitutes a payment, and when the action for money paid accrues.

Where a note of $200 was given by one person for the debt of another, and all but $7 of it was paid by the maker in money, and the note was then surrendered to the maker, the remaining $7 being transferred to his account with the payee: *Held*, that this was a payment and satisfaction of the note, and that an action for money paid for the use of the person for whose debt the note was given accrued for the amount of the note at that time. *Hitt v. Sharer*, 9

PLEADING.

Common counts.

In an action upon a promissory note, the plaintiff is entitled to a recovery under the common counts upon the original indebtedness constituting its consideration. *Bell v. Thompson*, 529

A demurrer construed to apply to another plea than the one to which it professed to be interposed.

Where the record recited that a replication was filed to the third plea, and also a demurrer to the same plea, which demurrer in the transcript of the record followed the replication; and the judgment of the court was that the demurrer be sustained to the second plea, as to which it was obvious that it was in substance interposed: *Held*, that the second plea not being otherwise answered, it was fair to presume the demurrer was understood by the parties and the court to apply to the second plea, otherwise the judgment would not have been rendered upon that plea. *Marc v. Kupfer*, 286

Special plea amounting to the general issue.

A special plea, setting up only matters the reverse of which the plaintiff is bound to prove in order to make out a *prima facie* case, is bad on general demurrer as amounting to the general issue. *Illinois Cent. R. R. Co. v. Johnson*, 389

Where, in assumpsit against a common carrier upon an alleged written agreement to forward goods to a point beyond the termination of its road, the defendant pleaded that by one of its regulations referred to in said writing and subject to which the goods were received, and which was then known and assented to by plaintiff, defendant was only to be liable for loss or damage to said goods while on defendant's road, and that its liability ceased upon their delivery to another carrier; with an averment that they were not lost or damaged by defendant, or on its road, but were safely delivered to the next common carrier on the route to their destination; and defendant pleaded, also, that it did safely carry and deliver said goods according to its freight regulations: *Held*, that both said pleas were bad as amounting to the general issue. Id, 389

PLEADING IN CHANCERY.

Statements of conclusions of fact in answer; pleadings and evidence.

The complainant has a right to have notice upon the record, in a precise and unambiguous manner, of the conclusions of fact intended to be drawn from allegations in an answer. The defendant is not required to state conclusions of law which he would deduce from the facts set forth; but if he states in his answer certain facts as evidence of a particular case which he represents to be the consequence of such facts, and on them rests his defense, he is not afterwards at liberty to use the same facts for the purpose of establishing a different defense from that to which he has drawn the complainant's attention by his answer; and evidence in support of such different defense will not be considered by the court. *Vogle v. Ripper*, 100

As security for a debt; when owner may resume possession.

When the owner pledges property or choses in action as a security for the payment of a debt, the owner, to reinvest himself with the right to resume possession of the property, must pay the claim, or at the very least, make a sufficient tender. *Henry v. Eddy*, 508

Right to hold the pledge passes to creditor's representatives.

On the death of the creditor, the right to hold the pledge passes to his representatives, and may be exercised by them in the same manner and to the same extent as by the creditor when living. Id., 508

Where it was doubtful upon the evidence whether a party holding a promissory note as security for a claim against its owner came into possession of it as agent of the administratrix of the deceased creditor, or as his clerk, it was *held*, in an action of trover against him by the debtor, that an instruction making the defendant's right to hold the note conditional upon the consent and agreement of the debtor, was erroneous. If it came to defendant's possession from the creditor or his administratrix and was held as a pledge, the consent of the debtor was immaterial Id., 508

POSSESSION OF CHATTELS.

Evidence of ownership.

Possession of personal property is *prima facie* evidence of ownership, sufficient till overcome by proof. Yet the *prima facie* case created by possession may be rebutted by the circumstances attending the possession. *Bergen v. Riggs*, 170

Presumption of ownership, how rebutted.

Since the army regulations of the United States require that all horses, as soon as acquired by the government, shall be branded with the letters "U. S.," if this brand is found upon an animal in the possession of another, that fact, unexplained, will overcome the presumption of ownership created by mere possession. Id., 170

Long and uninterrupted possession, or other circumstances, may, however, overcome the presumption of ownership in the government arising from such brand. Possession for one year would not, however, be sufficient to overcome such presumption. Id., 170

By the regulations of the U. S. service, when property is condemned it

is required to be branded with the letter "C.," which, if shown, would be evidence that the government had parted with the title to property found in the possession of an individual. Id., 170

PRACTICE.

Striking out special plea amounting to the general issue.

There is no error in striking out a special plea amounting to the general issue, although stricken out after a demurrer to it has been overruled. *Illinois Cent. R.R. Co. v. Johnson*, 389

Objections to competency of a witness can not be taken for the first time by instructions to the jury.

Where, upon the trial of an issue upon the question of usury, the defendant was permitted, without objection, to testify generally on his own behalf as to other facts than that of usury: *Held*, that the plaintiff could not thereafter put his objections to such testimony in the form of instructions to the jury that defendant was an incompetent witness, and that his testimony as to such other facts should be disregared; nor could he object thereto upon error. *Gordon v. Goodell*, 429

Diligence required to warrant setting aside default.

Where, upon an application to set aside a judgment by default against a garnishee, it appeared that the garnishee employed an attorney to prepare the answer to the interrogatories filed, who, by mistake as to the court in which the answer was required to be filed, was absent, in attendance on business in the supreme court, when the default was taken; and the garnishee, after retaining the attorney, gave no further attention to the matter; but it did not appear that the garnishee gave any information or directions to the attorney, as to the preparation of the answer, it was considered that (aside from the fact that setting aside a default was matter of discretion) sufficient diligence in preparing his defense had not been shown to warrant setting the judgment aside. *United States Express Co. v. Bedbury*, 459

Vacating judgments by default, a matter of discretion.

Whether a judgment by default against a garnishee shall be set aside and the party permitted to make a defense, is a matter resting alone in the sound discretion of the court, and not reviewable upon error. Id., 459

Removal of a cause from a state to a United States court; what the petition should state.

The petition to be filed for the removal of a cause from a state court to the circuit court of the United States, under the act of congress of September 24, 1789, is not required to state the alienage or citizenship of the parties, or the amount in controversy. *The People v. Superior Court of Chicago.* 356

The petition is, however, required to contain a prayer for the removal of the cause, and, as a matter of practice, it may appropriately state the facts upon which the removal is sought. Id., 356

How the facts to warrant a removal are to be established.

The act of congress does not require the petition to be verified in any manner. The facts upon which the petitioner bases his right to a removal must be made to appear to the satisfaction of the state court but no particular mode is prescribed in which they are to be made to appear, which may be by the admissions of the parties, by affidavit, or

by the testimony of witnesses. The usual mode is by stating them in the petition, and having its truth verified by affidavit. Id., 356

When the petition should be disposed of.

Upon the filing of a petition of that nature, the court should dispose of it at its earliest convenience, and no step should be taken in the cause until this is done. Id., 356

Order upon such petition how reviewed.

The proper practice for a party objecting to an order upon a petition for the removal of a cause from a state court to the circuit court of the United States is to preserve the evidence upon which it was made in a bill of exceptions. Id., 356

Citizenship to be shown at the time suit was commenced.

Where a petition verified by affidavit alleged that the plaintiffs were, on December 9, 1863, the time it was sworn to, citizens of this state, but did not allege that they were citizens of the state on the 25th of August, 1863, when the suit was commenced, and there was no evidence of that fact: *Held*, that the evidence afforded by the statement in the petition that the plaintiffs were citizens when it was sworn to was not sufficient evidence to show that they were citizens when the suit was commenced, and that an order for the removal of the cause was properly refused. Id., 356

PRACTICE IN CHANCERY.

The court may state an account without a reference.

The court has power to perform the duties ordinarily performed by its master in stating a partnership account between the parties; and in such case each party has the same rights before the court, in regard to the production of books, examination upon interrogatories, etc., that he would have before the master. *Montanye v. Hatch*, 394

Cross-bills may be filed as a matter of right; stay of the hearing of original cause.

The filing of a cross-bill is a matter of right, and requires no leave; but it does not necessarily stay the hearing of the original cause.[1] If the complainant in the cross-bill desires a stay of proceedings, he should make an application for that purpose which, when made at the proper time, or when the furtherance of justice requires such a bill to be filed, will usually be granted. *Beauchamp v. Putnam*, 378

A defendant desiring to file a cross-bill should do so without delay, and have the same at issue, if practicable, so as to be heard with the original bill. If he desires any further time, or that the two causes be heard together, he must seek it as a matter of indulgence. Id., 378

Court may give time to answer cross-bill.

The court is not required, at the hearing of an original cause, to order the defendants to a cross-bill to plead, answer or demur *instanter*. It may give time for answering, and postpone the hearing until the answer comes in; or it may give time, and proceed with the hearing. Id., 378

PRACTICE IN SUPREME COURT.

Objections to preliminary affidavit under act of 1861, *to be taken in court below*

An objection to the form of an affidavit required to be made under the act of 1861, preliminary to calling an opposite party as a witness, cannot be made for the first time upon error. *Bell v. Thompson*, 529

Exceptions.

Where no exception is taken to the overruling of a motion for a new trial, the evidence will not be examined by the appellate court to see whether it supports the finding of the jury. *Hitt v. Sharer*, 9

PRESUMPTIONS.

Definition, nature of grounds of legal presumption.

Legal presumptions are rules established by the common law, or by statute, and are founded upon the first principles of justice or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. *McCagg v. Heacock*, 476

Where one fact is proved or ascertained, another, its uniform concomitant, is universally and safely presumed; it is this uniformly experienced connection which leads to its recognition by law without other proof. Many of these presumptions are conclusive because they have been found to be so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent from motives of public policy, for the sake of greater certainty, and the promotion of the quiet and peace of community, and, therefore, all opposing evidence is forbidden. In some cases this common consent is declared through the medium of judicial tribunals as a part of the common law. In others, the conclusion from certain circumstances is declared by the legislature; and it is within the power of the legislature to extend such conclusions of law to such cases and to such circumstances as it may deem best for the public good. (See the opinion for an application of these principles to the general doctrine of limitation as applied to title to land.) Id., 476

Application to limitation law of 1839.

In this country the taxes upon land are usually paid by the true owner; and after payment of the same for seven successive years under claim and color of title made in good faith, and after actual possession taken under such color of title, the presumption of ownership is so strong that the legislature, for the promotion of quiet and the peace of community, in its wisdom, declared it to be a legal conclusion from such circumstances, that the possessor was the true owner to the extent and according to the purport of his paper title. Id., 476

See JURISDICTION. POSSESSION.

PROMISSORY NOTES.

Possession of, evidence of ownership.

The possession of a promissory note is presumptive evidence of ownership; but that ownership is limited by the statements of the possessor as to the character of his possession. *Henry v. Eddy*, 508

REPLEVIN.

Signification of "plaint" as used in the statute.

The Revised Statutes of this state (chap. 88, sec. 5) provide that proceedings in an action of replevin shall be commenced by "*plaint*," and this word has the same meaning that it had regarding proceedings under the statute of Marlbridge, 52 Hen. II, ch. 21. It signifies that there is to be a complaint made that the goods or chattels were wrongfully taken or are wrongfully detained; and this plaint mentioned in the statute is made by means of the affidavit required to be filed by or on behalf of the plaintiff. (See the proceedings at common law by original writ, and under the statute of Marlbridge by plaint, more fully explained in the opinion.) *Anderson v. Hapler*, 436

For things severed from the freehold.

As the ownership of land draws to it the constructive possession, the owner can maintain replevin for chattels (wood in this case) severed from the freehold, where there is no adverse possession. Id., 436

But the owner of the land cannot maintain replevin for chattels severed from land in the adverse possession of the defendant, or of a third person, the law not permitting him to assert his title to the land against the person in adverse possession, in that manner. Id., 436

It seems that a landlord may maintain replevin for chattels wrongfully severed from the freehold by a tenant, as the title to the land is not thereby drawn in question. Id., 436

For fixtures tortiously served.

Where a fixture constituting a part of the realty is tortiously served and removed without the consent of the owner of the fee, it becomes personalty, and may as such be recovered by him in an action of replevin. *Ogden v. Stock*, 522

Plaintiff may recover on his prior possession as against one wrongfully depriving him thereof.

Where a dredge-boat was sold successively under two judgments in attachment, both void for want of jurisdiction, and the last purchaser took the boat from the possession of the purchaser under the prior sale: *Held*, that the purchaser from whose possession it was taken was entitled, upon issues joined on pleas of *non cepit* and property in defendant, to recover on his prior possession. *Knisely v. Parker*, 481

SALES.

When the title passes without delivery.

As between the parties, the title to personal property passes without any delivery, when the sale is completed. An agreement to sell an arti-

cle by weight or measure, where the article is identified and the price agreed upon, may be a complete sale, if the parties intended it as such, although the article sold is not weighed or measured. *Holliday v. Burgess*, 193

No defense to action for purchase money, that vendor's title was void as to creditors.

In an action to recover the price of goods sold and delivered, the fact that the plaintiff came by the property under circumstances which would render his title invalid as against the creditors of his vendor, who claimed to act as agent for the plaintiff in making the sale of the property to defendant, constitutes no defense. *Root v. Wood*, 383

SCIRE FACIAS UPON FORFEITED RECOGNIZANCE.

Enlistment of principal in army, not a defense, but merely ground for continuance.

Where to a *scire facias* upon a forfeited recognizance the sureties pleaded that their principal, without their knowledge or consent, had, prior to the forfeiture of the recognizance, enlisted for three years in the United States military service and was still absent with his regiment and under the control of the military authorities in the state of Virginia, so that he could neither surrender himself nor be surrendered by his sureties, nor could custody of him be obtained by them by *habeas corpus* or otherwise, the court were inclined to think said plea presented no good defense, but showed ground for a continuance merely. *Gingrich v. The People*, 448

Sickness of principal not a defense, but ground for continuance.

Where to *scire facias* upon a forfeited recognizance the sureties pleaded that when said recognizance was forfeited and for a long time prior thereto and ever since that time, the principal was in the state of Virginia, sick and disabled, so that his sureties could not remove and surrender him without greatly endangering his life, the court were inclined to think that said plea did not present a good defense, but showed ground for a continuance merely. Id., 448

The *scire facias* in this case (which see at length in the statement of the case) was regarded as unobjectionable, and a model in like cases. Id., 448

SETOFF.

Of damages for breach of covenant against incumbrances, in an action upon the note for purchase money.

Where, upon the purchase of land, notes are given by the purchaser in consideration of the deed of conveyance and the covenant against incumbrances therein contained, and there is a breach of the covenant, it seems that if the grantee pays the incumbrance or any portion of it, he may have the damages thus sustained set off against the notes in an action against him thereon. The giving of the covenant and the notes form but one transaction, and damages arising from a breach of the covenant grow out of the contract and may be set off against the notes. *Willets v. Burgess*, 494

SPECIAL ASSESSMENTS.

Not taxes.

A special assessment is not a tax, but an exercise of the power of eminent domain. *Chicago v. Larned*, 203; *Chicago v. The Home Bank* 283

Must make just compensation.

Special assessments, being referable to the power of eminent domain, must, under section 11, article 13, Constitution of 1848, be held to be invalid unless they make "just compensation" in some mode, either by money or benefits. Id., 203; *Chicago v. The Home Bank*, 283

Equality and uniformity.

Although this compensation may be made by benefits, yet when these are exhausted, it then becomes a question of taxation, and the principles of equality and uniformity must apply. Id., 203; *Chicago v. The Home Bank*, 283.

Just compensation not a matter of form.

The just compensation required by the constitution is a matter of substance and not of form; and a proceeding which ignores this fact will be invalid. Id., 203; *Chicago v. The Home Bank*, 283

Assessment of injuries and benefits a judicial proceeding.

The assessment of injuries and benefits is in the nature of a judicial proceeding and must be surrounded with some sort of judicial sanction. The making of an estimate by the common council, in and by the act of ordering the improvement, that the benefits to the property assessed will be equal to the cost of the contemplated improvement, will not be sufficient. Id., 203; *Chicago v. The Home Bank*, 283

Principle to be adopted in making.

The principle to be adopted in making improvements, in which the whole public are interested, through the agency of special assessments, is to assess to each lot the special benefits it will derive from the improvement, charging such benefits upon the lots, the residue of the cost to be paid by equal and uniform taxation. Id., 203; *Chicago v. The Home Bank*, 283

Invalid, if made on basis of frontage.

An assessment for improvements, made on the basis of the frontage of lots upon the street to be improved, each separate block, lot, etc. to sustain, as nearly as may be, the cost and expense of making the improvement upon that half of the street directly in front of the same, and no compensation being provided for, is invalid as an exercise of the power of taxation, since it contains neither the element of equality nor uniformity; and also as an exercise of the right of eminent domain, since it provides no compensation. Id., 203; *Chicago v. The Home Bank*, 283

SPECIFIC PERFORMANCE.

See VENDOR AND PURCHASER.

STATUTES.

When they take effect: emergency clause.

In order to take an act out of the constitutional provision (sec. 23, art. 3 Const., 1848) that "no public act of the general assembly shall take effect or be in force until the expiration of sixty days from the end of the session at which the same may be passed, unless in case of emergency the general assembly shall otherwise direct," the legislature must direct that the act as a whole and entirety shall take effect at a different time; and it is not sufficient that certain parts of it might bear a construction which would, taken separately, give those parts effect at an earlier period. The direction must be made in a clear, distinct, and unequivocal provision, and cannot be helped out by any sort of intendment or implication. *Board of Supervisors of Iroquois County v. Keady*, 293

Where, therefore, an act to authorize an election for the removal of a county seat directed an election to be held on a day prior to the termination of the session, and the election was so held; but the act contained no emergency clause: *Held*, that this was not a compliance with the said constitutional provision; that the act had not taken effect when the election was held; and, therefore, that the election was unauthorized. Id., 293

STATUTE OF LIMITATIONS.

When a bar to action for money paid.

An action for money paid for the use of another, where the money was paid more than five years before suit brought therefor, and the promise to repay the same is not in writing, is barred by the statute of limitations (Scates' Comp., 752; Sess. Laws, 1849, 37). *Hitt v. Sharer*, 9

Same; mutual running accounts.

Where a note of $200 was given by one person for the debt of another, and all but $7 of it was paid by the maker in money and the note taken up more than five years before action brought by the maker for money paid, etc., the remaining $7 being transferred to the maker's account with the payee: *Held*, that the fact that the $7 was paid afterwards, and within the five years, did not remove the bar as to the advance made more than that period before bringing suit. In the case of mutual running accounts between parties, such is the law; but not so with mere isolated transactions, where the law implies a liability for immediate payment. Id., 9

Action on written contract to carry goods.

An action of assumpsit upon a written undertaking by a common carrier to carry goods is not, under the statute (Scates' Comp., 752), barred until the expiration of sixteen years from the time the action accrued. *Illinois Cent. R. R. Co. v. Johnson*, 389

Possession creates no bar against the government.

Although long and uninterrupted possession of personal property may overcome the presumption of ownership in the government arising from its being branded "U. S.," such possession creates no bar by limitation to its recovery by the government. *Bergen v. Riggs*, 170

Color of title; deed from mortgagor to mortagee in satisfaction of the debt.

Where the mortgagor in a mortgage executed Oct. 25, 1836, conveyed a portion of the mortgaged premises to the mortgagee in satisfaction of the debt on July 1, 1840, and the premises so conveyed remained vacant and unoccupied from 1840 till January 13, 1853—during which time the mortgagee paid all taxes thereon — when he sold them to defendant, who soon after his purchase entered into and continued in possession; and on July 5, 1837, a third party recovered a judgment against the mortgagor, under which the mortgagor's interest in the premises was, on February 24, 1841, sold, and a sheriff's deed executed on the 13th of June, 1842, to the purchaser: *Held*, on a bill to redeem, filed February 11, 1854, by parties claiming under the sheriff's deed against the purchaser from the mortgagee, that the deed of July 1, 1840, from the mortgagor to the mortgagee, was color of title; and the grantee in such deed having had color of title, made in good faith (the conveyance having been made in payment of a just debt) for more than seven years, and having during that time paid the taxes his grantee acquired a complete bar. *McCagg v. Heacock*, 476

What constitutes color of title.

Any instrument indicating an intention to pass a title to lands, of which a description is given, from one party to another, gives color of title to the lands described. For some reason such an instrument often fails to effect that intention, and passes only the color or semblance of a title. It makes no difference whether the instrument fails to pass a title because the grantor had none to convey, or had no authority in law or in fact to convey one. Inasmuch as the instrument fails to pass an absolute title, for the reason that the grantor was not possessed of one or more necessary requisites, it gives the semblance or color only of what its effect would be if they were not wanting. Id., 476

Color of title presumed to have been acquired in good faith.

The law presumes that all acts are done in good faith until there is evidence to the contrary; and color of title is presumed to have been thus acquired, till it is shown to have been acquired otherwise. Id., 476

Good faith defined.

The good faith required by the statute in the creation or acquisition of title is a freedom from a design to defraud the person having the better title. Id., 476

Notice of adverse claim, not evidence of bad faith.

The knowledge of an adverse claim to or lien upon property does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien. Id., 476

In equity.

Where the statute of limitations would be a bar in a court of law, it seems that it would also be a bar under the same circumstances in a court of equity. The statute cannot be avoided by a change of forum. Where the jurisdiction is concurrent, the statute also applies to the court of equity. *Gilbert v. Guptill*, 112

Citation of guardian to account, not within the statute.

A citation of a guardian to account before the probate court is not a suit within the meaning of the statute of limitations, and is not barred by the lapse of five years, after the ward has arrived at age, before the

commencement of the proceedings. It is a means of ascertaining a delinquency, so that suit may be brought for the amount of the delinquency, so adjudged by the probate court, against the obligors in the bond; and the statute cannot be pleaded in bar to such proceedings so long as the bond has force and vitality. Id., 112

Same; where guardian submits to an accounting, he cannot afterwards raise the question.

Even if the statute of limitations were a good plea to such a citation, still where the guardian submits to an accounting, and his account is disapproved and he ordered to make another, which he does, he cannot insist upon the statute in such second account made in pursuance of such order, inasmuch as his rendering an account shows that he still occupies the position of a trustee towards his beneficiary, and while that relation continues, the statute cannot be interposed. Id., 112

SUBROGATION.

See SURETY.

SURETY.

Released by extension of time of payment to principal.

If the time for payment of a promissory note is extended by a binding agreement between the holder and the principal debtor, without the consent of the surety, the latter will be released from all liability, unless he subsequently ratifies the agreement. *Woolford v. Dow*, 424

The agreement to extend must be sustained by a new consideration.

Such agreement to be binding must be sustained by a new consideration. Where, therefore, a note of $1,000 was due in six months from its date with ten per cent. interest; and the holder, without the consent of the surety, after the note matured, agreed with the principals to extend the time of payment, if they would pay the ten per cent. interest and one hundred dollars each month in liquidation of the note until it should be paid, it was *held* that, there being no new considertion, the agreement for an extension was a mere *nudum pactum*, and therefore that the surety was not released. Had the interest been paid in advance after the maturity of the note, it would have constituted a consideration for the agreement. Id., 424

Subrogation and discharge of sureties upon official bonds.

The act of February 14, 1855, incorporating the board of sewerage commissioners of the city of Chicago, and which was a public act, pro vided that the funds of the board should, at all times until disposed of, be kept deposited in such place or places of deposit as should, by an order of said board, be directed, provided, that such place or places of deposit should first be approved by the common council. The board selected the Marine Bank of Chicago, as a place of deposit for its funds, and reported its action to the mayor and common council, and thereafter deposits were made by the treasurer of the board with this bank, with the knowledge of the city. The act also provided that the funds thus held on deposit should be drawn out upon checks or drafts, regularly numbered, and payable to the person or persons for whose benefit they were intended, briefly specifying for what purpose or account they are drawn; and the act made the receiving or

appropriating of any of its funds by any officer of the board, for his own use or benefit, embezzlement. The treasurer, in violation of said act, drew checks upon said bank which were not numbered, and which were payable to himself and others, or bearer, without specifying any purpose or account for which the same were drawn, upon which he obtained a large amount of money of said bank and appropriated it to his own use; he also hypothecated sewerage bonds with said bank to secure an individual note discounted for his accommodation, which bonds were sold in market and the proceeds applied in payment of said note. With full knowledge of all the facts, the treasurer then being a defaulter for the sum of $34,732.46, the city made a settlement with the bank, and executed it a formal release from all liability for deposits theretofore made with it, and brought suit upon the treasurer's official bond: *Held*, that although no formal approval appeared upon its minutes, it would be presumed that the common council approved of the place of deposit; that the provisions of the act relative to the designation and approval of the place of deposit, and the manner of drawing funds, were intended for the protection of the city as well as to direct the mode in which the business of the board of commissioners should be transacted, it being intend tahtde the city should have the benefit of the responsibility of the bailee with whom its funds were deposited, as security for their safe keeping; that the bank remained liable to the city for the funds improperly paid out by it upon such checks, drawn in violation of the law; that the treasurer's sureties had the right, upon the payment of their liability to the city, to be subrogated to its rights against the bank; and the city having discharged the bank from all claims for money deposited and paid out upon such illegal checks, and thereby deprived the sureties of their right to subrogation, the sureties were discharged from liability upon said bond so far as their right of subrogation was destroyed. *Foss v. Chicago*, 488

SWAMP LANDS.

Title to, vested in state by virtue of the act of congress.

The act of congress, approved September 28th, 1850, entitled "An act to enable the state of Arkansas and other states to reclaim swamp lands within their limits," vested in the state the legal title to such lands as were selected and appropriated under its provisions, as effectually as if conveyed by a patent, and in such case no patent is necessary to pass the title. *Dart v. Hercules*, 395

Certified copy of recorded list sufficient evidence of title.

Under act of 1852 (Sess. Laws, 178), entitled "An act to dispose of swamp and overflowed lands, and to pay the expenses of selecting and surveying the same," and the amendatory act of 1854 (Laws of 2d Sess., 21), a duly certified copy of the list of such lands, made by the auditor and filed and recorded in the county clerk's office of the proper county, is all that is required to show title thereto in the state and county, and has the same force as a patent from the state for school lands. Id., 395

Conveyances of swamp lands by counties through a special commissioner.

Both by virtue of the general enactment contained in the revision of 1845 (p. 132), and by the act of February 16, 1857 (Sess. Laws, 122), the county of Livingston may convey the swamp lands within its limits by a special commissioner appointed for that purpose; and it is not requisite that the deed therefor be executed by the county clerk. Id., 395

TAXATION.

Equality and uniformity indispensable.

Under sections 2 and 5, article 9 of the Constitution of 1848, the principles of equality and uniformity are indispensable to all legal taxation, whether of a general or local character. *Chicago v. Larned*, 203; *Chicago v. The Home Bank*, 208

See Special Assessments.

TENANT FOR LIFE.

Must pay the taxes.

The assignee of a life estate in land subject to the payment of a stipulated rent is bound to pay the taxes assessed upon the demised premises during his tenancy, and can not recoup or set off the same against the rent of the premises. *Prettyman v. Walston*, 175

TRUSTS AND TRUSTEES.

Patentee of land with notice of a prior entry, a trustee of the legal title.

Where land is entered by one person, the purchase money paid, and a receiver's receipt taken therefor, and subsequently the entry is canceled by mistake (which, however, is subsequently corrected), and the land, after such erroneous cancellation, is entered by another person having full notice of the facts, and a patent therefor issued to him, he will hold the legal title as trustee for the benefit of the person who made the prior entry, and may be compelled by bill in equity to convey it to him. *Forbes v. Hall*, 159

Second purchaser not entitled to be reimbursed purchase money, etc.

Such subsequent purchaser will not, on a bill filed against him to compel a conveyance of the legal title, where he purchased with full notice and for the purpose of defrauding the prior purchaser of the land, be entitled to be reimbursed the purchase money and taxes paid by him on the premises. Id., 159

Failure to demand title before suit, not a bar to relief; costs.

The fact that the prior purchaser makes no demand for the title before suit brought can have no other effect upon his rights than to relieve the second purchaser, the defendant, from the payment of the costs in the circuit court; it will not bar the right to a conveyance of the legal title. Id., 159

USE AND OCCUPATION.

See Landlord and Tenant.

USURY.

Once paid, cannot be recovered back.

Since the passage of the act of 1857 (Scates' Comp., 600), an action does not lie for the recovery back of money voluntarily paid as usurious interest. *Manny v. Stockton*, 306; *Ramsey v. Perley*, 504

VENDOR AND PURCHASER.

Time of tender of deed is material at law.

Where one party sells land to another and agrees to convey the same as soon as he can make title, at which time a certain payment is to be made and a bond and mortgage given for the unpaid purchase money, in a proceeding at law by the vendor to recover the amount agreed to be paid, the time of executing and tendering the deed is material. In such case, in order to put the vendee in default it is the duty of the vendor, within a reasonable time after the day when he is able to make title, to tender the deed. *Sanford v. Emory*, 468

Right to a specific performance as affected by time.

Where the vendor agreed to convey as soon as he was able to make title, at which time the vendee was to make a payment and execute a bond and mortgage for the unpaid purchase money; and the vendor was able to make title at any time after November 18, 1856, and did not tender a deed till January 30, 1859, neither did the vendee at any time notify the vendor that he was ready to comply with the contract on the execution of a deed; it was considered that neither party was in a position to compel a specific performance. Id., 468

Time of the essence of the contract.

The parties to a contract for the sale of land may make time of the essence of the contract; and a court of equity has no more right than a court of law to dispense with an express stipulation of parties in regard to time, in contracts of this nature, where no fraud, accident or mistake has intervened. *Heckard v. Sayre*, 142

Where, therefore, a tender of the amount due on a contract for the sale of land, wherein time was made of the essence of the contract, was not made by the vendee till six days after it fell due, and the only excuse set up for the vendee's neglect to make the payment at the time required, was that he was then engaged in the discharge of his official duties as clerk of the circuit court: *Held*, on a bill filed by the vendee for a specific performance, that the excuse was insufficient. Id., 142

Attempt to collect purchse money, a waiver of a forfeiture.

Should the vendor in such case attempt to compel the payment of the note given by the vendee for the purchase money, an equitable right to a conveyance of the land would then exist which, upon a proper application would be enforced. Id., 142

Time, when of the essence of the contract.

In contracts for the purchase of land, time is not considered as necessarily of their essence; but it may be made essential by an express stipulation of the parties, or it may be deemed so from the nature of the property or the purposes for which it was purchased, or from other circumstances specially surrounding the case. The precise phraseology in which such an agreement is expressed is not important. The essential element of the agreement on the part of the vendee is, that he undertakes to make payment of the purchase money at the very time stipulated as a condition to the continuance of his rights under the contract. (See a variety of forms of stipulations stated in the opinion. The stipulation was express in this case.) *Milnor v. Willard* 38

Poverty of purchaser, no excuse for non-performance.

Where in a bill for the specific performance of a contract for the purchase of land, wherein time of payment was made of the essence of the contract, the only reason alleged for relief from the effect of non-performance by failure to pay at the stipulated time, was that complainant was a poor man, and at that time unable to comply with his contract: *Held*, that the alleged excuse was insufficient. Id., 38

Rescission of contract for failure to make title.

Where the deed contains a covenant for the conveyance of the title, and at the maturity of the notes given upon the purchase of the land, the maker offers to perform his part of the contract, and the payee is unable to convey title, the maker may rescind the contract, avoid the payment of the notes and recover any portion of the purchase money already paid. *Willetts v. Burgess*, 494

VERDICT.

Conviction on a general verdict will be referred to the good counts of the indictment.

A conviction on a general verdict will not be questioned, although some of the counts are faulty, if there be one good count in the indictment. It will be presumed, unless the contrary appears, that the conviction was under the good and not under the faulty counts. *Hiner v. The People*, 297

WITNESSES.

Interest.

In an action to recover the value of a corn sheller, for which an order had been drawn by the defendant in favor of plaintiff upon a third party, and which the plaintiff claimed the drawee refused to accept, the drawee of such order is a competent witness for defendant to prove the acceptance thereof. *Tarble v. Underwood*, 67

In an action against a railroad company to recover damages resulting from the neglect of an engine driver to sound the whistle or ring the bell at a place required by law, the engine driver is incompetent to testify on behalf of defendant as to whether the whistle was sounded or bell rung at the place in question. *Chicago & R. I. R. R. Co. v. Hutchins*, 108

Codefendants in chancery.

A defendant to a bill in chancery may be examined as a witness by his codefendant, if his testimony does not affect his own interest; so, in case his interest is equally balanced between the parties, or is against the interest of his codefendant. *Mixell v. Lutz*, 382

Wife of nominal defendant.

The wife of a nominal defendant to a bill in chancery, who is a competent witness for a codefendant, may be examined as a witness in behalf of such codefendant. Id., 382

Complainant not competent in his own behalf.

The complainant in a bill in chancery is no more competent to testify in his own behalf than a plaintiff at law. Id., 382

When parties to the record are competent.

A party to a suit may be examined as a witness in favor of the opposite

party and against himself, or those with whom he is associated of record, if he does not personally object to giving evidence, or is not disqualified on the ground of interest. *Bell v. Thompson*, 529

When a partner is competent for plaintiff in an action against his firm.

Where one member of a firm has taken the notes and accounts of the firm, and is to pay the liabilities, he is a competent witness for a creditor of the firm in an action against himself and the other members of the firm (Crook *v.* Taylor, 12 Ill., 353, approved, and the rule in Brown *v.* Hurd, 25 Ill., 616, qualified so as not to exclude the testimony of patries who are not disqualified on the ground of interest and who do not object to testifying). Id., 529

Preliminary affidavit under act of 1861.

The affidavit required by the act of February 20, 1861, to be made preliminary to calling an opposite party as a witness, is not required to state the facts set forth to be true to the knowledge of the party making it, but may be made upon information and belief. Id., 529

When, under act of 1861, *all of defendants need not be called.*

Said act does not allow the party making the affidavit to testify, until he has called all the other parties; but he is not required to call all of them if he does not desire to testify himself; in such case he may examine one or more of the opposite parties as he thinks proper. Id., 529

Impeachment of witnesses.

In order to lay the foundation for impeaching testimony by showing that the witness has made contradictory statements, he should first be asked if he made the statement which it is proposed to prove that he did make, and his attention should be called to the time when and place where these statements were made. *Root v. Wood*, 283

See GUARDIAN.

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